# TITLE 17—COPYRIGHTS

*Title 17, enacted by act July 30, 1947, ch. 391, 61 Stat. 652, was effective until January 1, 1978, and as revised in its entirety by Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2541, became effective January 1, 1978, except sections 118, 304(b), and chapter 8, which became effective October 19, 1976*


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## Prior Provisions

Title 17, as enacted by act July 30, 1947, ch. 391, 61 Stat. 652, consisting of sections 1 to 32, 101 to 116, and 201 to 216, as amended through 1976, and section 203, as amended by Pub. L. 95-94, title IV, § 406(a), Aug. 5, 1977, 91 Stat. 682, terminated Jan. 1, 1978.

## Effective Date

Section 102 of Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2598, provided that: "This Act [enacting this title and section 170 of Title 2, The Congress, amending section 131 of Title 2, section 290e of Title 15, Commerce and Trade, section 2318 of Title 18, Crimes and Criminal Procedure, section 543 of Title 26, Internal Revenue Code of 1954, section 1498 of Title 28, Judiciary and Judicial Procedure, sections 3203 and 3206 of Title 39, Postal Service, and sections 505 and 2113 of Title 44, Public Printing and Documents, and enacting provisions set out as notes below and under sections 104, 115, 304, 401, 407, 410, and 501 of this title] becomes effective on January 1, 1978, except as otherwise expressly provided by this Act, including provisions of the first section of this Act. The provisions of sections 118, 304(b), and chapter 8 of title 17, as amended by the first section of this Act, take effect upon enactment of this Act [Oct. 19, 1976]."

## Separability of Provisions

Section 115 of Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2602, provided that: "If any provision of title 17 [this title], as amended by the first section of this Act, is declared unconstitutional, the validity of the remainder of this title is not affected."

## Authorization of Appropriations

Section 114 of Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2602, provided that: "There are hereby authorized to be appropriated such funds as may be necessary to carry out the purposes of this Act [this title]."

LOST AND EXPIRED COPYRIGHTS; RECORDING RIGHTS

Section 103 of Pub. L. 94-553, Oct. 19, 1976, 90 Stat. 2599, provided that: "This Act [enacting this title] does not provide copyright protection for any work that goes into the public domain before January 1, 1978. The exclusive rights, as provided by section 106 of title 17 as amended by the first section of this Act, to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909."

CROSS REFERENCES

Exclusive jurisdiction of Federal courts over actions and proceedings under copyright laws, see section 1338 of Title 28, Judiciary and Judicial Procedure.

Power of the Congress to regulate copyrights, see Const., Art. I, § 8, cl. 8.

## CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

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### § 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The terms "including" and "such as" are illustrative and not limitative.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publi-

cation as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2541.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant.

**§ 102. Subject matter of copyright: In general**

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2544.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Original Works of Authorship.** The two fundamental criteria of copyright protection—originality and fixation in tangible form are restated in the first sentence of this cornerstone provision. The phrase "original works or authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

In using the phrase "original works of authorship," rather than "all the writings of an author" now in section 4 of the statute [section 4 of former title 17], the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, [U.S.C. Const. Art. 1, § 8, cl. 8], a recurring question has been whether the statutory and the constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase—"original works of authorship"—in characterizing the general subject matter of statutory copyright protection.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 [this section] implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by the explicit recognition of all forms of choreography, there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.

**Fixation in Tangible Form.** As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) [28 S.Ct. 319, 52 L.Ed. 655], under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be—whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

Under the bill, the concept of fixation is important since it not only determines whether the provisions of

the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section 301, an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.

The bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.

Thus, assuming it is copyrightable—as a "motion picture" or "sound recording," for example—the content of a live transmission should be regarded as fixed and should be accorded statutory protection if it is being recorded simultaneously with its transmission. On the other hand, the definition of "fixation" would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the "memory" of a computer.

Under the first sentence of the definition of "fixed" in section 101, a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy or phonorecord and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The second sentence makes clear that, in the case of "a work consisting of sounds, images, or both, that are being transmitted," the work is regarded as "fixed" if a fixation is being made at the same time as the transmission.

Under this definition "copies" and "phonorecords" together will comprise all of the material objects in which copyrightable works are capable of being fixed. The definitions of these terms in section 101, together with their usage in section 102 [this section] and throughout the bill, reflect a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth. It is possible to have an "original work of authorship" without having a "copy" or "phonorecord" embodying it, and it is also possible to have a "copy" or "phonorecord" embodying something that does not qualify as an "original work of authorship." The two essential elements—original work and tangible object—must merge through fixation in order to produce subject matter copyrightable under the statute.

**Categories of Copyrightable Works.** The second sentence of section 102 [this section] lists seven broad categories which the concept of "works of authorship" is said to "include." The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. The items are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories. In the aggregate, the list covers all classes of works now specified in section 5 of title 17 [section 5 of former title 17]; in addition, it specifically enumerates "pantomimes and choreographic works".

Of the seven items listed, four are defined in section 101. The three undefined categories—"musical works," "dramatic works," and "pantomimes and choreographic works"—have fairly settled meanings. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute since the form of a work would no longer be of any importance, nor is it necessary to specify that "choreographic works" do not include social dance steps and simple routines.

The four items defined in section 101 are "literary works," "pictorial, graphic, and sculptural works," "motion pictures and audiovisual works", and "sound recordings." In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification. The term "literary works" does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.

Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) [section 5(k) of former title 17] as "prints or labels used for articles of merchandise." However, since this terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately.

In accordance with the Supreme Court's decision in *Mazer v. Stein*, 347 U.S. 201 (1954) [74 S.Ct. 460, 98 L. Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1096], works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. The scope of exclusive rights in these works is given special treatment in section 113, to be discussed below.

The Committee has added language to the definition of "pictorial, graphic, and sculptural works" in an effort to make clearer the distinction between works of applied art protectable under the bill and industrial designs not subject to copyright protection. The declaration that "pictorial, graphic, and sculptural works" include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned" is classic language; it is drawn from Copyright Office regulations promulgated in the

1940's and expressly endorsed by the Supreme Court in the Mazer case.

The second part of the amendment states that "the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." A "useful article" is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." This part of the amendment is an adaptation of language added to the Copyright Office Regulations in the mid-1950's in an effort to implement the Supreme Court decision in the Mazer case.

In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statue or carving is used to embellish an industrial product or, as in the Mazer case, is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design—that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend on the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.

The Committee has considered, but chosen to defer, the possibility of protecting the design of typefaces. A "typeface" can be defined as a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters. The Committee does not regard the design of typeface, as thus defined, to be a copyrightable "pictorial, graphic, or sculptural work" within the meaning of this bill and the application of the dividing line in section 101.

Enactment of Public Law 92-140 in 1971 [Pub. L. 92-140, Oct. 15, 1971, 85 Stat. 391, which amended sections 1, 5, 19, 20, 26, and 101 of former title 17, and enacted provisions set out as a note under section 1 of former title 17] marked the first recognition in American copyright law of sound recordings as copyrightable works. As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of musical, spoken, or other sounds that have been fixed in tangible form. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "phonorecords," the latter being physical objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "phonorecord."

As a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution [U.S.C. Const. Art. 1, § 8, cl. 8], and the extension of limited statutory protection to them was too long delayed. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the copyright protection that would prevent the reproduction and distribution of unauthorized phonorecords of sound recordings is clearly justified.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.

Sound tracks of motion pictures, long a nebulous area in American copyright law, are specifically included in the definition of "motion pictures," and excluded in the definition of "sound recordings." To be a "motion picture," as defined, requires three elements: (1) a series of images, (2) the capability of showing the images in certain successive order, and (3) an impression of motion when the images are thus shown. Coupled with the basic requirements of original authorship and fixation in tangible form, this definition encompasses a wide range of cinematographic works embodied in films, tapes, video disks, and other media. However, it would not include: (1) unauthorized fixations of live performances or telecasts, (2) live telecasts that are not fixed simultaneously with their transmission, or (3) filmstrips and slide sets which, although consisting of a series of images intended to be shown in succession, are not capable of conveying an impression of motion.

On the other hand, the bill equates audiovisual materials such as filmstrips, slide sets, and sets of transparencies with "motion pictures" rather than with "pictorial, graphic, and sculptural works." Their sequential showing is closer to a "performance" than to a "display," and the definition of "audiovisual works," which applies also to "motion pictures," embraces works consisting of a series of related images that are by their nature, intended for showing by means of projectors or other devices.

**Nature of Copyright.** Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts. Section 102(b) makes clear that copyright protection does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Some concern has been expressed lest copyright in computer programs should extend protection to the methodology or processes adopted by the programmer,

rather than merely to the "writing" expressing his ideas. Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.

Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.

CROSS REFERENCES

Actions and remedies for infringement of copyright, see section 501 et seq. of this title.

Common law rights, see section 301 of this title.

Copyright as distinct from property in object copyrighted, see section 202 of this title.

Copyright not capital asset, see section 1221 of Title 26, Internal Revenue Code.

Duration of copyright, see section 301 et seq. of this title.

Fees, see section 708 of this title.

Government works as not copyrightable, see section 105 of this title.

Power of Congress to grant authors exclusive right to their writings, see Const. Art. 1, § 8, cl. 8.

Preemption of other laws that come within subject matter of this section, see section 301 of this title.

Proclamation by President granting foreign authors copyright protection, see section 104 of this title.

Regulations, see section 702 of this title.

Subject matter of copyright—

Compilations and derivative works, see section 103 of this title.

National origin, see section 104 of this title.

United States Government works, see section 105 of this title.

Transfer and bequests of copyright, see section 201 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 103, 104, 301 of this title.

### § 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2545.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material. Section 103(b) is also intended to define, more sharply and clearly than does section 7 of the present law [section 7 of former title 17], the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is commonly misunderstood today: copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Between them the terms "compilations" and "derivative works" which are defined in section 101 [section 101 of this title], comprehend every copyrightable work that employs preexisting material or data of any kind. There is necessarily some overlapping between the two, but they basically represent different concepts. A "compilation" results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright. A "derivative work," on the other hand, requires a process of recasting, transforming, or adapting "one or more preexisting works"; the "preexisting work" must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted.

The second part of the sentence that makes up section 103(a) deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to "any part of the work in which such material has been used unlawfully," the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized. Under this provision, copyright could be obtained as long as the use of the preexisting work was not "unlawful," even though the consent of the copyright owner had not been obtained. For instance, the unauthorized reproduction of a work might be "lawful" under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.

CROSS REFERENCES

Preemption of other laws that come within subject matter of this section, see section 301 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 104, 301 of this title.

### § 104. Subject matter of copyright: National origin

#### (a) Unpublished Works

The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

#### (b) Published Works

The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a for-

eign nation that is a party to a copyright treaty to which the United States is also a party, or is a stateless person, wherever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a party to the Universal Copyright Convention; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2545.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 104 of the bill [this section], which sets forth the basic criteria under which works of foreign origin can be protected under the U.S. copyright law, divides all works coming within the scope of sections 102 and 103 into two categories: unpublished and published. Subsection (a) imposes no qualifications of nationality and domicile with respect to unpublished works. Subsection (b) would make published works subject to protection under any one of four conditions:

(1) The author is a national or domiciliary of the United States or of a country with which the United States has copyright relations under a treaty, or is a stateless person;

(2) The work is first published in the United States or in a country that is a party to the Universal Copyright Convention;

(3) The work is first published by the United Nations, by any of its specialized agencies, or by the Organization of American States; or

(4) The work is covered by a Presidential proclamation extending protection to works originating in a specified country which extends protection to U.S. works "on substantially the same basis" as to its own works.

The third of these conditions represents a treaty obligation of the United States. Under the Second Protocol of the Universal Copyright Convention, protection under U.S. Copyright law is expressly required for works published by the United Nations, by U.N. specialized agencies and by the Organization of American States.

REFERENCES IN TEXT

The Universal Copyright Convention, referred to in subsec. (b)(2), probably means the Universal Copyright Convention as revised at Paris on July 24, 1971, effective July 10, 1974, set out below.

UNIVERSAL COPYRIGHT CONVENTION

PARIS, 1971

The Universal Copyright Convention was revised at Paris on July 24, 1971. It entered into force for the United States on July 10, 1974. The text of the Convention, as revised at Paris, is as follows:

The Contracting States,

Moved by the desire to ensure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have resolved to revise the Universal Copyright Convention as signed at Geneva on 6 September 1952 (hereinafter called "the 1952 Convention"), and consequently,

Have agreed as follows:

ARTICLE I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

ARTICLE II

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.

2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals, as well as the protection specially granted by this Convention.

3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

ARTICLE III

1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

2. The provisions of paragraph 1 shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

3. The provisions of paragraph 1 shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the

court or an administrative office, or both, a copy of the work involved in the litigation; provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed.

4. In each Contracting State there shall be legal means of protecting without formalities the unpublished works of nationals of other Contracting States.

5. If a Contracting State grants protection for more than one term of copyright and the first term is for a period longer than one of the minimum periods prescribed in Article IV, such State shall not be required to comply with the provisions of paragraph 1 of this Article in respect of the second or any subsequent term of copyright.

ARTICLE IV

1. The duration of protection of a work shall be governed, in accordance with the provisions of Article II and this Article, by the law of the Contracting State in which protection is claimed.

2. (a) The term of protection for works protected under this Convention shall not be less than the life of the author and twenty-five years after his death. However, any Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than twenty-five years from the date of first publication.

(b) Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than twenty-five years from the date of first publication or from its registration prior to publication, as the case may be.

(c) If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall not be less than one of the minimum periods specified in subparagraphs (a) and (b).

3. The provisions of paragraph 2 shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works.

4. (a) No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

(b) For the purposes of the application of subparagraph (a), if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term.

5. For the purposes of the application of paragraph 4, the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national.

6. For the purposes of the application of paragraph 4, in case of simultaneous publication in two or more Contracting States, the work shall be treated as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States.

ARTICLE IV*bis*

1. The rights referred to in Article I shall include the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting. The provisions of this Article shall extend to works protected under this Convention either in their original form or in any form recognizably derived from the original.

2. However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights mentioned in paragraph 1 of this Article. Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

ARTICLE V

1. The rights referred to in Article I shall include the exclusive right of the author to make, publish and authorize the making and publication of translations of works protected under this Convention.

2. However, any Contracting State may, by its domestic legislation, restrict the right of translation of writings, but only subject to the following provisions:

(a) If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in a language in general use in the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non-exclusive licence from the competent authority thereof to translate the work into that language and publish the work so translated.

(b) Such national shall in accordance with the procedure of the State concerned, establish either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A licence may also be granted on the same conditions if all previous editions of a translation in a language in general use in the Contracting State are out of print.

(c) If the owner of the right of translation cannot be found, then the applicant for a licence shall send copies of his application to the publisher whose name appears on the work and, if the nationality of the owner of the right of translation is known, to the diplomatic or consular representative of the State of which such owner is a national, or to the organization which may have been designated by the government of that State. The licence shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application.

(d) Due provision shall be made by domestic legislation to ensure to the owner of the right of translation a compensation which is just and conforms to international standards, to ensure payment and transmittal of such compensation, and to ensure a correct translation of the work.

(e) The original title and the name of the author of the work shall be printed on all copies of the published translation. The licence shall be valid only for publication of the translation in the territory of the Contracting State where it has been applied for. Copies so published may be imported and sold in another Contracting State if a language in general use in such other State is the same language as that into which the work has been so translated, and if the domestic law in such other State makes provision for such licences and does not prohibit such importation

and sale. Where the foregoing conditions do not exist, the importation and sale of such copies in a Contracting State shall be governed by its domestic law and its agreements. The licence shall not be transferred by the licensee.

(f) The licence shall not be granted when the author has withdrawn from circulation all copies of the work.

ARTICLE V*bis*

1. Any Contracting State regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations may, by a notification deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization (hereinafter called "the Director-General") at the time of its ratification, acceptance or accession or thereafter, avail itself of any or all of the exceptions provided for in Articles V*ter* and V*quater*.

2. Any such notification shall be effective for ten years from the date of coming into force of this Convention, or for such part of that ten-year period as remains at the date of deposit of the notification, and may be renewed in whole or in part for further periods of ten years each if, not more than fifteen or less than three months before the expiration of the relevant ten-year period, the contracting State deposits a further notification with the Director-General. Initial notifications may also be made during these further periods of ten years in accordance with the provisions of this Article.

3. Notwithstanding the provisions of paragraph 2, a Contracting State that has ceased to be regarded as a developing country as referred to in paragraph 1 shall no longer be entitled to renew its notification made under the provisions of paragraph 1 or 2, and whether or not it formally withdraws the notification such State shall be precluded from availing itself of the exceptions provided for in Articles V*ter* and V*quater* at the end of the current ten-year period, or at the end of three years after it has ceased to be regarded as a developing country, whichever period expires later.

4. Any copies of a work already made under the exceptions provided for in Articles V*ter* and V*quater* may continue to be distributed after the expiration of the period for which notifications under this Article were effective until their stock is exhausted.

5. Any Contracting State that has deposited a notification in accordance with Article XIII with respect to the application of this Convention to a particular country or territory, the situation of which can be regarded as analogous to that of the States referred to in paragraph 1 of this Article, may also deposit notifications and renew them in accordance with the provisions of this Article with respect to any such country or territory. During the effective period of such notifications, the provisions of Articles V*ter* and V*quater* may be applied with respect to such country or territory. The sending of copies from the country or territory to the Contracting State shall be considered as export within the meaning of Articles V*ter* and V*quater*.

ARTICLE V*ter*

1. (a) Any Contracting State to which Article V*bis* (1) applies may substitute for the period of seven years provided for in Article V(2) a period of three years or any longer period prescribed by its legislation. However, in the case of a translation into a language not in general use in one or more developed countries that are party to this Convention or only the 1952 Convention, the period shall be one year instead of three.

(b) A Contracting State to which Article V*bis* (1) applies may, with the unanimous agreement of the developed countries party to this Convention or only the 1952 Convention and in which the same language is in general use, substitute, in the case of translation into that language, for the period of three years provided for in sub-paragraph (a) another period as determined by such agreement but not shorter than one year. However, this sub-paragraph shall not apply where the language in question is English, French or Spanish. Notification of any such agreement shall be made to the Director-General.

(c) The licence may only be granted if the applicant, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the owner of the right of translation, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as he makes his request he shall inform either the International Copyright Information Centre established by the United Nations Educational, Scientific and Cultural Organization or any national or regional information centre which may have been designated in a notification to that effect deposited with the Director-General by the government of the State in which the publisher is believed to have his principal place of business.

(d) If the owner of the right of translation cannot be found, the applicant for a licence shall send, by registered airmail, copies of his application to the publisher whose name appears on the work and to any national or regional information centre as mentioned in sub-paragraph (c). If no such centre is notified he shall also send a copy to the international copyright information centre established by the United Nations Educational, Scientific and Cultural Organization.

2. (a) Licences obtainable after three years shall not be granted under this Article until a further period of six months has elapsed and licences obtainable after one year until a further period of nine months has elapsed. The further period shall begin either from the date of the request for permission to translate mentioned in paragraph 1(c) or, if the identity or address of the owner of the right of translation is not known, from the date of dispatch of the copies of the application for a licence mentioned in paragraph 1(d).

(b) Licences shall not be granted if a translation has been published by the owner of the right of translation or with his authorization during the said period of six or nine months.

3. Any licence under this Article shall be granted only for the purpose of teaching, scholarship or research.

4. (a) Any licence granted under this Article shall not extend to the export of copies and shall be valid only for publication in the territory of the Contracting State where it has been applied for.

(b) Any copy published in accordance with a licence granted under this Article shall bear a notice in the appropriate language stating that the copy is available for distribution only in the Contracting State granting the licence. If the writing bears the notice specified in Article III (1) the copies shall bear the same notice.

(c) The prohibition of export provided for in sub-paragraph (a) shall not apply where a governmental or other public entity of a State which has granted a licence under this Article to translate a work into a language other than English, French or Spanish sends copies of a translation prepared under such licence to another country if:

(i) the recipients are individuals who are nationals of the Contracting State granting the licence, or organizations grouping such individuals;

(ii) the copies are to be used only for the purpose of teaching, scholarship or research;

(iii) the sending of the copies and their subsequent distribution to recipients is without the object of commercial purpose; and

(iv) the country to which the copies have been sent has agreed with the Contracting State to allow the receipt, distribution or both and the Director-General has been notified of such agreement by any one of the governments which have concluded it.

5. Due provision shall be made at the national level to ensure:

(a) that the licence provides for just compensation that is consistent with standards of royalties normally

operating in the case of licences freely negotiated between persons in the two countries concerned; and

(b) payment and transmittal of the compensation; however, should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

6. Any licence granted by a Contracting State under this Article shall terminate if a translation of the work in the same language with substantially the same content as the edition in respect of which the licence was granted is published in the said State by the owner of the right of translation or with his authorization, at a price reasonably related to that normally charged in the same State for comparable works. Any copies already made before the licence is terminated may continue to be distributed until their stock is exhausted.

7. For works which are composed mainly of illustrations a licence to translate the text and to reproduce the illustrations may be granted only if the conditions of Article V*quater* are also fulfilled.

8. (a) A licence to translate a work protected under this Convention, published in printed or analogous forms of reproduction, may also be granted to a broadcasting organization having its headquarters in a Contracting State to which Article V*bis* (1) applies, upon an application made in that State by the said organization under the following conditions:

(i) the translation is made from a copy made and acquired in accordance with the laws of the Contracting State;

(ii) the translation is for use only in broadcasts intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession;

(iii) the translation is used exclusively for the purposes set out in condition (ii), through broadcasts lawfully made which are intended for recipients on the territory of the Contracting State, including broadcasts made through the medium of sound or visual recordings lawfully and exclusively made for the purpose of such broadcasts;

(iv) sound or visual recordings of the translation may be exchanged only between broadcasting organizations having their headquarters in the Contracting State granting the licence; and

(v) all uses made of the translation are without any commercial purpose.

(b) Provided all of the criteria and conditions set out in sub-paragraph (a) are met, a licence may also be granted to a broadcasting organization to translate any text incorporated in an audio-visual fixation which was itself prepared and published for the sole purpose of being used in connexion with systematic instructional activities.

(c) Subject to sub-paragraphs (a) and (b), the other provisions of this Article shall apply to the grant and exercise of the licence.

9. Subject to the provisions of this Article, any licence granted under this Article shall be governed by the provisions of Article V, and shall continue to be governed by the provisions of Article V and of this Article, even after the seven-year period provided for in Article V(2) has expired. However, after the said period has expired, the licensee shall be free to request that the said licence be replaced by a new licence governed exclusively by the provisions of Article V.

### ARTICLE V*quater*

1. Any Contracting State to which Article V*bis* (1) applies may adopt the following provisions:

(a) If, after the expiration of (i) the relevant period specified in sub-paragraph (c) commencing from the date of first publication of a particular edition of a literary, scientific or artistic work referred to in paragraph 3, or (ii) any longer period determined by national legislation of the State, copies of such edition have not been distributed in that State to the general public or in connexion with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works, by the owner of the right of reproduction or with his authorization, any national of such State may obtain a non-exclusive licence from the competent authority to publish such edition at that or a lower price for use in connexion with systematic instructional activities. The licence may only be granted if such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to publish such work, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as he makes his request he shall inform either the international copyright information centre established by the United Nations Educational, Scientific and Cultural Organization or any national or regional information centre referred to in sub-paragraph (d).

(b) A licence may also be granted on the same conditions if, for a period of six months, no authorized copies of the edition in question have been on sale in the State concerned to the general public or in connexion with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works.

(c) The period referred to in sub-paragraph (a) shall be five years except that:

(i) for works of the natural and physical sciences, including mathematics, and of technology, the period shall be three years;

(ii) for works of fiction, poetry, drama and music, and for art books, the period shall be seven years.

(d) If the owner of the right of reproduction cannot be found, the applicant for a licence shall send, by registered air mail, copies of his application to the publisher whose name appears on the work and to any national or regional information centre identified as such in a notification deposited with the Director-General by the State in which the publisher is believed to have his principal place of business. In the absence of any such notification, he shall also send a copy to the international copyright information centre established by the United Nations Educational, Scientific and Cultural Organization. The licence shall not be granted before the expiration of a period of three months from the date of dispatch of the copies of the application.

(e) Licences obtainable after three years shall not be granted under this Article:

(i) until a period of six months has elapsed from the date of the request for permission referred to in sub-paragraph (a) or, if the identity or address of the owner of the right of reproduction is unknown, from the date of the dispatch of the copies of the application for a licence referred to in sub-paragraph (d);

(ii) if any such distribution of copies of the edition as is mentioned in sub-paragraph (a) has taken place during that period.

(f) The name of the author and the title of the particular edition of the work shall be printed on all copies of the published reproduction. The licence shall not extend to the export of copies and shall be valid only for publication in the territory of the Contracting State where it has been applied for. The licence shall not be transferable by the licensee.

(g) Due provision shall be made by domestic legislation to ensure an accurate reproduction of the particular edition in question.

(h) A licence to reproduce and publish a translation of a work shall not be granted under this Article in the following cases:

(i) where the translation was not published by the owner of the right of translation or with his authorization;

(ii) where the translation is not in a language in general use in the State with power to grant the licence.

2. The exceptions provided for in paragraph 1 are subject to the following additional provisions:

(a) Any copy published in accordance with a licence granted under this Article shall bear a notice in the appropriate language stating that the copy is available for distribution only in the Contracting State to which the said licence applies. If the edition bears the notice specified in Article III (1), the copies shall bear the same notice.

(b) Due provision shall be made at the national level to ensure:

(i) that the licence provides for just compensation that is consistent with standards of royalties normally operating in the case of licences freely negotiated between persons in the two countries concerned; and

(ii) payment and transmittal of the compensation; however, should national currency regulations intervene, the competent authority shall make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

(c) Whenever copies of an edition of a work are distributed in the Contracting State to the general public or in connexion with systematic instructional activities, by the owner of the right of reproduction or with his authorization, at a price reasonably related to that normally charged in the State for comparable works, any licence granted under this Article shall terminate if such edition is in the same language and is substantially the same in content as the edition published under the licence. Any copies already made before the licence is terminated may continue to be distributed until their stock is exhausted.

(d) No licence shall be granted when the author has withdrawn from circulation all copies of the edition in question.

3. (a) Subject to sub-paragraph (b), the literary, scientific or artistic works to which this Article applies shall be limited to works published in printed or analogous forms of reproduction.

(b) The provisions of this Article shall also apply to reproduction in audio-visual form of lawfully made audio-visual fixations including any protected works incorporated therein and to the translation of any incorporated text into a language in general use in the State with power to grant the license; always provided that the audio-visual fixations in question were prepared and published for the sole purpose of being used in connexion with systematic instructional activities.

ARTICLE VI

"Publication", as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

ARTICLE VII

This Convention shall not apply to works or rights in works which, at the effective date of this Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State.

ARTICLE VIII

1. This Convention, which shall bear the date of 24 July 1971, shall be deposited with the Director-General and shall remain open for signature by all States party to the 1952 Convention for a period of 120 days after the date of this Convention. It shall be subject to ratification or acceptance by the signatory States.

2. Any State which has not signed this Convention may accede thereto.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General.

ARTICLE IX

1. This Convention shall come into force three months after the deposit of twelve instruments of ratification, acceptance or accession.

2. Subsequently, this Convention shall come into force in respect of each State three months after that State has deposited its instrument of ratification, acceptance or accession.

3. Accession to this Convention by a State not party to the 1952 Convention shall also constitute accession to that Convention; however, if its instrument of accession is deposited before this Convention comes into force, such State may make its accession to the 1952 Convention conditional upon the coming into force of this Convention. After the coming into force of this Convention, no State may accede solely to the 1952 Convention.

4. Relations between States party to this Convention and States that are party only to the 1952 Convention, shall be governed by the 1952 Convention. However, any State party only to the 1952 Convention may, by a notification deposited with the Director-General, declare that it will admit the application of the 1971 Convention to works of its nationals or works first published in its territory by all States party to this Convention.

ARTICLE X

1. Each Contracting State undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood that at the date this Convention comes into force in respect of any State, that State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE XI

1. An Intergovernmental Committee is hereby established with the following duties:

(a) to study the problems concerning the application and operation of the Universal Copyright Convention;

(b) to make preparation for periodic revisions of this Convention;

(c) to study any other problems concerning the international protection of copyright, in co-operation with the various interested international organizations, such as the United Nations Educational, Scientific and Cultural Organization, the International Union for the Protection of Literary and Artistic Works and the Organization of American States;

(d) to inform States party to the Universal Copyright Convention as to its activities.

2. The Committee shall consist of the representatives of eighteen States party to this Convention or only to the 1952 Convention.

3. The Committee shall be selected with due consideration to a fair balance of national interests on the basis of geographical location, population, languages and stage of development.

4. The Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director-General of the World Intellectual Property Organization and the Secretary-General of the Organization of American States, or their representatives, may attend meetings of the Committee in an advisory capacity.

ARTICLE XII

The Intergovernmental Committee shall convene a conference for revision whenever it deems necessary, or at the request of at least ten States party to this Convention.

ARTICLE XIII

1. Any Contracting State may, at the time of deposit of its instrument of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Director-General that this Convention shall apply to all or any of the countries or territories for the international relations of which it is responsible and this Convention shall thereupon apply to the countries or territories named in such notifica-

tion after the expiration of the term of three months provided for in Article IX. In the absence of such notification, this Convention shall not apply to any such country or territory.

2. However, nothing in this Article shall be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a country or territory to which this Convention is made applicable by another Contracting State in accordance with the provisions of this Article.

ARTICLE XIV

1. Any Contracting State may denounce this Convention in its own name or on behalf of all or any of the countries or territories with respect to which a notification has been given under Article XIII. The denunciation shall be made by notification addressed to the Director-General. Such denunciation shall also constitute denunciation of the 1952 Convention.

2. Such denunciation shall operate only in respect of the State or of the country or territory on whose behalf it was made and shall not take effect until twelve months after the date of receipt of the notification.

ARTICLE XV

A dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

ARTICLE XVI

1. This Convention shall be established in English, French, and Spanish. The three texts shall be signed and shall be equally authoritative.

2. Official texts of this Convention shall be established by the Director-General, after consultation with the governments concerned, in Arabic, German, Italian and Portuguese.

3. Any Contracting State or group of Contracting States shall be entitled to have established by the Director-General other texts in the language of its choice by arrangement with the Director-General.

4. All such texts shall be annexed to the signed texts of this Convention.

ARTICLE XVII

1. This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.

2. In application of the foregoing paragraph, a declaration has been annexed to the present Article. This declaration is an integral part of this Convention for the States bound by the Berne Convention on 1 January 1951, or which have or may become bound to it at a later date. The signature of this Convention by such States shall also constitute signature of the said declaration, and ratification, acceptance or accession by such States shall include the declaration, as well as this Convention.

ARTICLE XVIII

This Convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date this Convention comes into force in such State shall not be affected.

ARTICLE XIX

This Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States. In the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date on which this Convention comes into force in such State shall not be affected. Nothing in this Article shall affect the provisions of Articles XVII and XVIII.

ARTICLE XX

Reservations to this Convention shall not be permitted.

ARTICLE XXI

1. The Director-General shall send duly certified copies of this Convention to the States interested and to the Secretary-General of the United Nations for registration by him.

2. He shall also inform all interested States of the ratifications, acceptances and accessions which have been deposited, the date on which this Convention comes into force, the notifications under this Convention and denunciations under Article XIV.

APPENDIX DECLARATION RELATING TO ARTICLE XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works (hereinafter called "the Berne Union") and which are signatories to this Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the coexistence of the Berne Convention and the Universal Copyright Convention,

Recognizing the temporary need of some States to adjust their level of copyright protection in accordance with their stage of cultural, social and economic development,

Have, by common agreement, accepted the terms of the following declaration:

(a) Except as provided by paragraph (b), works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the Berne Union after 1 January 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;

(b) Where a Contracting State is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, and has deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization, at the time of its withdrawal from the Berne Union, a notification to the effect that it regards itself as a developing country, the provisions of paragraph (a) shall not be applicable as long as such State may avail itself of the exceptions provided for by this Convention in accordance with Article V*bis*;

(c) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the Berne Union.

RESOLUTION CONCERNING ARTICLE XI

The Conference for Revision of the Universal Copyright Convention,

Having considered the problems relating to the Intergovernmental Committee provided for in Article XI of this Convention, to which this resolution is annexed,

Resolves that:

1. At its inception, the Committee shall include representatives of the twelve States members of the Intergovernmental Committee established under Article XI of the 1952 Convention and the resolution annexed to it, and, in addition, representatives of the following States: Algeria, Australia, Japan, Mexico, Senegal and Yugoslavia.

2. Any States that are not party to the 1952 Convention and have not acceded to this Convention before the first ordinary session of the Committee following the entry into force of this Convention shall be replaced by other States to be selected by the Committee at its first ordinary session in conformity with the provisions of Article XI (2) and (3).

3. As soon as this Convention comes into force the Committee as provided for in paragraph 1 shall be deemed to be constituted in accordance with Article XI of this Convention.

4. A session of the Committee shall take place within one year after the coming into force of this Convention; thereafter the Committee shall meet in ordinary session at intervals of not more than two years.

5. The Committee shall elect its Chairman and two Vice-Chairmen. It shall establish its Rules of Procedure having regard to the following principles:

(a) The normal duration of the term of office of the members represented on the Committee shall be six years with one-third retiring every two years, it being however, understood that, of the original terms of office, one-third shall expire at the end of the Committee's second ordinary session which will follow the entry into force of this Convention, a further third at the end of its third ordinary session, and the remaining third at the end of its fourth ordinary session.

(b) The rules governing the procedure whereby the Committee shall fill vacancies, the order in which terms of membership expire, eligibility for reelection, and election procedures, shall be based upon a balancing of the needs for continuity of membership and rotation of representation, as well as the considerations set out in Article XI(3).

Expresses the wish that the United Nations Educational, Scientific and Cultural Organization provide its Secretariat.

In faith whereof the undersigned, having deposited their respective full powers, have signed this Convention.

Done at Paris, this twenty-fourth day of July 1971, in a single copy.

### Protocol 1

#### Annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the aplication of that Convention to works of Stateless persons and refugees

The States party hereto, being also party to the Universal Copyright Convention as revised at Paris on 24 July 1971 (hereinafter called "the 1971 Convention"),

Have accepted the following provisions:

1. Stateless persons and refugees who have their habitual residence in a State party to this Protocol shall, for the purposes of the 1971 Convention, be assimilated to the nationals of that State.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the 1971 Convention applied hereto.

(b) This Protocol shall enter into force in respect of each State, on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the 1971 Convention with respect to such State, whichever is the later.

(c) On the entry into force of this Protocol in respect of a State not party to Protocol 1 annexed to the 1952 Convention, the latter Protocol shall be deemed to enter into force in respect of such State.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Paris this twenty-fourth day of July 1971, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization. The Director-General shall send certified copies to the signatory States, and to the Secretary-General of the United Nations for registration.

### Protocol 2

#### Annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the aplication of that Convention to the works of certain international organizations

The States party hereto, being also party to the Universal Copyright Convention as revised at Paris on 24 July 1971 (hereinafter called "the 1971 Convention"),

Have accepted the following provisions:

1. (a) The protection provided for in Article II (1) of the 1971 Convention shall apply to works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organization of American States.

(b) Similarly, Article II (2) of the 1971 Convention shall apply to the said organization or agencies.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the 1971 Convention applied hereto.

(b) This Protocol shall enter into force for each State on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the 1971 Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Paris, this twenty-fourth day of July 1971, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization. The Director-General shall send certified copies to the signatory States, and to the Secretary-General of the United Nations for registration.

## Universal Copyright Convention

### Geneva, 1952

The Unesco Universal Copyright Convention was adopted by the Intergovernmental Copyright Conference at Geneva, Switzerland, on Sept. 6, 1952. It entered into force for the United States on Sept. 16, 1955.

The text of the Convention is as follows: The Contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have agreed as follows:

### Article I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

ARTICLE II

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.

2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.

3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

ARTICLE III

1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

2. The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

3. The provisions of paragraph 1 of this article shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the court or an administrative office, or both, a copy of the work involved in the litigation; provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed.

4. In each Contracting State there shall be legal means of protecting without formalities the unpublished works of nationals of other Contracting States.

5. If a Contracting State grants protection for more than one term of copyright and the first term is for a period longer than one of the minimum periods prescribed in article IV, such State shall not be required to comply with the provisions of paragraph 1 of this article III in respect of the second or any subsequent term of copyright.

ARTICLE IV

1. The duration of protection of a work shall be governed, in accordance with the provisions of article II and this article, by the law of the Contracting State in which protection is claimed.

2. The term of protection for works protected under this Convention shall not be less than the life of the author and 25 years after his death.

However, any Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than 25 years from the date of first publication.

Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than 25 years from the date of first publication or from its registration prior to publication, as the case may be.

If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall not be less than one of the minimum periods specified above.

3. The provisions of paragraph 2 of this article shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works.

4. No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

For the purposes of the application of the preceding provision, if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term.

5. For the purposes of the application of paragraph 4 of this article, the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national.

6. For the purposes of the application of paragraph 4 of this article, in case of simultaneous publication in two or more Contracting States, the work shall be treated as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States.

ARTICLE V

1. Copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention.

2. However, any Contracting State may, by its domestic legislation, restrict the right of translation of writings, but only subject to the following provisions:

If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in the national language or languages, as the case may be, of the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non-exclusive license from the competent authority thereof to translate the work and publish the work so translated in any of the national languages in which it has not been published; provided that such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A license may also be granted on the same conditions if all previous editions of a translation in such language are out of print.

If the owner of the right of translation cannot be found, then the applicant for a license shall send copies of his application to the publisher whose name

appears on the work and, if the nationality of the owner of the right of translation is known, to the diplomatic or consular representative of the State of which such owner is a national, or to the organization which may have been designated by the government of that State. The license shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application.

Due provision shall be made by domestic legislation to assure to the owner of the right of translation a compensation which is just and conforms to international standards, to assure payment and transmittal of such compensation, and to assure a correct translation of the work.

The original title and the name of the author of the work shall be printed on all copies of the published translation. The license shall be valid only for publication of the translation in the territory of the Contracting State where it has been applied for. Copies so published may be imported and sold in another Contracting State if one of the national languages of such other State is the same language as that into which the work has been so translated, and if the domestic law in such other State makes provision for such licenses and does not prohibit such importation and sale. Where the foregoing conditions do not exist, the importation and sale of such copies in a Contracting State shall be governed by its domestic law and its agreements. The license shall not be transferred by the licensee.

The license shall not be granted when the author has withdrawn from circulation all copies of the work.

ARTICLE VI

"Publication", as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

ARTICLE VII

This Convention shall not apply to works or rights in works which, at the effective date of the Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State.

ARTICLE VIII

1. This Convention, which shall bear the date of September 6, 1952, shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization and shall remain open for signature by all States for a period of 120 days after that date. It shall be subject to ratification or acceptance by the signatory States.

2. Any State which has not signed this Convention may accede thereto.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General of the United Nations Educational, Scientific and Cultural Organization.

ARTICLE IX

1. This Convention shall come into force three months after the deposit of twelve instruments of ratification, acceptance or accession, among which there shall be those of four States which are not members of the International Union for the Protection of Literary and Artistic Works.

2. Subsequently, this Convention shall come into force in respect of each State three months after that State has deposited its instrument of ratification, acceptance or accession.

ARTICLE X

1. Each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood, however, that at the time an instrument of ratification, acceptance or accession is deposited on behalf of any State, such State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE XI

1. An Intergovernmental Committee is hereby established with the following duties:

(a) to study the problems concerning the application and operation of this Convention;

(b) to make preparation for periodic revisions of this Convention;

(c) to study any other problems concerning the international protection of copyright, in co-operation with the various interested international organizations, such as the United Nations Educational, Scientific and Cultural Organization, the International Union for the Protection of Literary and Artistic Works and the Organization of American States;

(d) to inform the Contracting States as to its activities.

2. The Committee shall consist of the representatives of twelve Contracting States to be selected with due consideration to fair geographical representation and in conformity with the Resolution relating to this article, annexed to this Convention.

The Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works and the Secretary-General of the Organization of American States, or their representatives, may attend meetings of the Committee in an advisory capacity.

ARTICLE XII

The Intergovernmental Committee shall convene a conference for revision of this Convention whenever it deems necessary, or at the request of at least ten Contracting States, or of a majority of the Contracting States if there are less than twenty Contracting States.

ARTICLE XIII

Any Contracting State may, at the time of deposit of its instrument of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization that this Convention shall apply to all or any of the countries or territories for the international relations of which it is responsible and this Convention shall thereupon apply to the countries or territories named in such notification after the expiration of the term of three months provided for in article IX. In the absence of such notification, this Convention shall not apply to any such country or territory.

ARTICLE XIV

1. Any Contracting State may denounce this Convention in its own name or on behalf of all or any of the countries or territories as to which a notification has been given under article XIII. The denunciation shall be made by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization.

2. Such denunciation shall operate only in respect of the State or of the country or territory on whose behalf it was made and shall not take effect until twelve months after the date of receipt of the notification.

ARTICLE XV

A dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

ARTICLE XVI

1. This Convention shall be established in English, French and Spanish. The three texts shall be signed and shall be equally authoritative.

2. Official texts of this Convention shall be established in German, Italian and Portuguese.

Any Contracting State or group of Contracting States shall be entitled to have established by the Director-General of the United Nations Educational, Scientific and Cultural Organization other texts in the language of its choice by arrangement with the Director-General.

All such texts shall be annexed to the signed texts of this Convention.

ARTICLE XVII

1. This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.

2. In application of the foregoing paragraph, a Declaration has been annexed to the present article. This Declaration is an integral part of this Convention for the States bound by the Berne Convention on January 1, 1951, or which have or may become bound to it at a later date. The signature of this Convention by such States shall also constitute signature of the said Declaration, and ratification, acceptance or accession by such States shall include the Declaration as well as the Convention.

ARTICLE XVIII

This Convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date this Convention comes into force in such State shall not be affected.

ARTICLE XIX

This Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States. In the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date on which this Convention comes into force in such State shall not be affected. Nothing in this article shall affect the provisions of article XVII and XVIII of this Convention.

ARTICLE XX

Reservations to this Convention shall not be permitted.

ARTICLE XXI

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall send duly certified copies of this Convention to the States interested, to the Swiss Federal Council and to the Secretary-General of the United Nations for registration by him.

He shall also inform all interested States of the ratifications, acceptances and accessions which have been deposited, the date on which this Convention comes into force, the notifications under Article XIII of this Convention, and denunciations under Article XIV.

APPENDIX DECLARATION RELATING TO ARTICLE XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works, and which are signatories to the Universal Copyright Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the co-existence of the Convention of Berne and the Universal Convention,

Have, by common agreement, accepted the terms of the following declaration:

(a) Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after January 1, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;

(b) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.

RESOLUTION CONCERNING ARTICLE XI

The Intergovernmental Copyright Conference

Having considered the problems relating to the Intergovernmental Committee provided for in Article XI of the Universal Copyright Convention

resolves

1. The first members of the Committee shall be representatives of the following twelve States, each of those States designating one representative and an alternate: Argentina, Brazil, France, Germany, India, Italy, Japan, Mexico, Spain, Switzerland, United Kingdom, and United States of America.

2. The Committee shall be constituted as soon as the Convention comes into force in accordance with article XI of this Convention;

3. The Committee shall elect its Chairman and one Vice-Chairman. It shall establish its rules of procedure having regard to the following principles:

(a) the normal duration of the term of office of the representatives shall be six years; with one third retiring every two years;

(b) before the expiration of the term of office of any members, the Committee shall decide which States shall cease to be represented on it and which States shall be called upon to designate representatives; the representatives of those States which have not ratified, accepted or acceded shall be the first to retire;

(c) the different parts of the world shall be fairly represented;

and expresses the wish

that the United Nations Educational, Scientific, and Cultural Organization provide its Secretariat.

In faith whereof the undersigned, having deposited their respective full powers, have signed this Convention. Done at Geneva, this sixth day of September, 1952 in a single copy.

Protocol 1 annexed to the Universal Copyright Convention concerning the application of that Convention to the works of stateless persons and refugees

The States parties hereto, being also parties to the Universal Copyright Convention (hereinafter referred to as the "Convention") have accepted the following provisions:

1. Stateless persons and refugees who have their habitual residence in a State party to this Protocol shall, for the purposes of the Convention, be assimilated to the nationals of that State.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of article VIII of the Convention applied hereto.

(b) This Protocol shall enter into force in respect of each State, on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Geneva this sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of Unesco. The Director-General shall send certified copies to the signatory States, to the Swiss Federal Council and to the Secretary-General of the United Nations for registration.

Protocol 2 annexed to the Universal Copyright Convention, concerning the application of that Convention to the works of certain international organizations

The State parties hereto, being also parties to the Universal Copyright Convention (hereinafter referred to as the "Convention"),

Have accepted the following provisions:

1. (a) The protection provided for in article II (1) of the Convention shall apply to works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organisation of American States;

(b) Similarly, article II (2) of the Convention shall apply to the said organisation or agencies.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of article VIII of the Convention applied hereto.

(b) This Protocol shall enter into force for each State on the date of deposit of the instrument of ratification, acceptance or accession of the State concerned or on the date of entry into force of the Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Geneva, this sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of the Unesco.

The Director-General shall send certificated copies to the signatory States, to the Swiss Federal Council, and to the Secretary-General of the United Nations for registration.

Protocol 3 annexed to the Universal Copyright Convention concerning the effective date of instruments of ratification or acceptance of or accession to that Convention

States parties hereto,

Recognizing that the application of the Universal Copyright Convention (hereinafter referred to as the "Convention") to States participating in all the international copyright systems already in force will contribute greatly to the value of the Convention;

Have agreed as follows:

1. Any State party hereto may, on depositing its instrument of ratification or acceptance of or accession to the Convention, notify the Director-General of the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as "Director-General") that that instrument shall not take effect for the purposes of Article IX of the Convention until any other State named in such notification shall have deposited its instrument.

2. The notification referred to in paragraph 1 above shall accompany the instrument to which it relates.

3. The Director-General shall inform all States signatory or which have then acceded to the Convention of any notifications received in accordance with this Protocol.

4. This Protocol shall bear the same date and shall remain open for signature for the same period as the Convention.

5. It shall be subject to ratification or acceptance by the signatory States. Any State which has not signed this Protocol may accede thereto.

6. (a) Ratification or acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General.

(b) This Protocol shall enter into force on the date of deposit of not less than four instruments of ratification or acceptance or accession. The Director-General shall inform all interested States of this date. Instruments deposited after such date shall take effect on the date of their deposit.

In faith whereof the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Geneva, the sixth day of September 1952, in the English, French and the Spanish languages, the three texts being equally authoritative, in a single copy which shall be annexed to the original copy of the Convention. The Director-General shall send certified copies to the signatory States to the Swiss Federal Council, and to the Secretary-General of United Nations for registration.

PARTICULAR PROCLAMATIONS, TREATIES AND CONVENTIONS ESTABLISHING COPYRIGHT RELATIONS BETWEEN THE UNITED STATES OF AMERICA AND OTHER COUNTRIES

(Revised to January 1, 1980)

By virtue of presidential proclamations, treaties, and conventions, the United States has established copyright relations with various other countries. This appendix is an attempt to present a complete and annotated list of those countries. Treaties and conventions on the subject of copyright relations in force January 1, 1961, are also included in the preceding pages under appropriate country or subject headings.

Proclamations by the President of the United States extending copyright protection, upon compliance with the provisions of the United States copyright law, to the works of foreign authors prior to July 1, 1909, were issued pursuant to section 13 of the Act of March 3, 1891 (26 Stat. 1106) and those issued subsequent to July 1, 1909, were issued under the provisions of sections 1(e) and 8(b) of the Act of March 4, 1909 (35 Stat. 1075) and as later amended. Section 8(b) was amended by the Act of December 18, 1919 (41 Stat. 368) and the Act of September 25, 1941 (55 Stat. 732). Those sections of the Act of March 4, 1909, as amended, became sections 1(e) and 9(b), respectively, of Title 17 of the United States Code when it was codified and enacted into positive law by the Act of July 30, 1947 (61 Stat. 652). A number of the proclamations were preceded or accompanied by exchanges of diplomatic notes which served as the basis for their issuance. Such exchanges of notes, if in force January 1, 1958, and if printed in the official pamphlet series, are included in the preceding pages under appropriate country and subject headings.

The period for compliance with the conditions and formalities prescribed by the copyright law was extended by proclamation with respect to certain works in the case of a number of countries because of the disruption or suspension of facilities essential for such compliance during World War I and World War II. In the case of World War I this period was extended by proclamations issued under the Act of December 18, 1919 (41 Stat. 368) to fifteen months after the proclamation of peace, as to works published after August 1, 1914, and before the proclamation of peace. In the case of World War II, this period was extended by proclamations issued under the Act of September 25, 1941 (55 Stat. 732) until such time as terminated or suspended, either by the terms of the proclamation itself or by the issuance of a subsequent proclamation. A number of the proclamations issued under the 1919 Act and all of the proclamations issued under the 1941

Act or section 9(b) of title 17 of the United States Code refer to rights previously granted.

## KEY TO SYMBOLS

### Proclamations

- **P** — Proclamation issued pursuant to section 13 of the Act of March 3, 1891, Section 8(b) of the Act of March 4, 1909, and as amended, or Section 9(b) of Title 17 of the United States Code.
- **Pm** — Proclamation including mechanical reproduction rights for music under Section 1(e) of the United States copyright law.
- **Px** — Proclamation providing an extension of time under the Act of December 18, 1919, for compliance with the conditions and formalities prescribed by the United States copyright law.
- **Pmx** — Proclamation specifically including provisions similar to those contained in both "Pm" and "Px" proclamations.
- **Pxx** — Proclamation providing an extension of time under the Act of September 25, 1941, for compliance with the conditions and formalities prescribed by the United States copyright law.
- **Po** — Proclamation specifically issued for the purpose of terminating a proclamation issued under the Act of September 25, 1941.

### Treaties and Conventions

- **BAC** — Buenos Aires Convention. Convention on literary and artistic copyright signed at the Fourth International Conference of American States at Buenos Aires August 11, 1910.
- **MCC** — Mexico City Convention. Convention on literary and artistic copyrights signed at the Second International Conference of American States at Mexico January 27, 1902.
- **UCC** — Universal Copyright Convention. Done at Geneva September 6, 1952.
- **UCC rev.** — Universal Copyright Convention, revised. Done at Paris July 24, 1971.
- **C** — Bilateral convention.
- **Cm** — Bilateral convention including provisions covering mechanical reproduction rights for music.
- **T** — Treaty relating in part to copyright.

### Proclamations, Treaties, and Conventions Establishing Copyright Relations Between the United States and Other Countries

| Country | Document | Date of document | Date effective | Reference |
|---|---|---|---|---|
| Algeria | UCC | Sept. 6, 1952 | Aug. 28, 1973 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| Andorra | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Argentina | Pm | Aug. 23, 1934 | Aug. 23, 1934 | 49 Stat. 3413. |
| | BAC | Aug. 11, 1910 | Apr. 19, 1950 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Feb. 13, 1958 | 6 UST 2731. |
| Australia [1] | Pm | Apr. 3, 1918 | Mar. 15, 1918 | 40 Stat. 1764. |
| | Pxx [2] | Dec. 29, 1949 | Dec. 29, 1949 | 64 Stat. A385. |
| | UCC | Sept. 6, 1952 | May 1, 1969 | 6 UST 2731. |
| Austria [3] | P | Sept. 20, 1907 | Sept. 20, 1907 | 35 Stat. 2155. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Px | May 25, 1922 | May 25, 1922 | 42 Stat. 2273. |
| | Pm | Mar. 11, 1925 | Aug. 1, 1920 | 44 Stat. 2571. |
| | UCC | Sept. 6, 1952 | July 2, 1957 | 6 UST 2731. |
| Bahamas, The. | UCC | Sept. 6, 1952 | Oct. 11, 1976 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Dec. 26, 1976 | 25 UST 1341. |
| Bangladesh | UCC | Sept. 6, 1952 | Aug. 5, 1975 | 6 UST 2731. |
| Belgium | P | July 1, 1891 | July 1, 1891 | 27 Stat. 981. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | June 14, 1911 | ....do.... | 37 Stat. 1688. |
| | UCC | Sept. 6, 1952 | Aug. 31, 1960 | 6 UST 2731. |
| Bolivia | BAC | Aug. 11, 1910 | May 15, 1914 | 38 Stat. 1785. |
| Brazil | BAC | ....do.... | Aug. 31, 1915 | Do. |
| | Pm | Apr. 2, 1957 | Apr. 2, 1957 | 8 UST 424. |
| | UCC | Sept. 6, 1952 | Jan. 13, 1960 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Dec. 11, 1975 | 25 UST 1341. |
| Bulgaria | UCC | Sept. 6, 1952 | June 7, 1975 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | June 7, 1975 | 25 UST 1341. |
| Cambodia | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Cameroon | UCC | Sept. 6, 1952 | May 1, 1973 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 134. |
| Canada [1] | Pm | Dec. 27, 1923 | Jan. 1, 1924 | 43 Stat. 1932. |
| | UCC | Sept. 6, 1952 | Aug. 10, 1962 | 6 UST 2731. |
| Chile | P | May 25, 1896 | May 25, 1896 | 29 Stat. 880. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | Nov. 18, 1925 | July 1, 1925 | 44 Stat. 2590. |
| | BAC | Aug. 11, 1910 | June 14, 1955 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| China | T [4] | Oct. 8, 1903 | Jan. 13, 1904 | 33 Stat. 2208. |
| | T [4] | Nov. 4, 1946 | Nov. 30, 1948 | 63 Stat. 1299. |
| Colombia | BAC | Aug. 11, 1910 | Dec. 23, 1936 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | June 18, 1976 | 6 UST 2721. |
| | UCC rev. | July 24, 1971 | ....do.... | 25 UST 1341. |
| Costa Rica | P | Oct. 19, 1899 | Oct. 19, 1899 | 31 Stat. 1955. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | MCC | Jan. 27, 1902 | June 30, 1908 | 35 Stat. 1934. |
| | BAC | Aug. 11, 1910 | Nov. 30, 1916 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Cuba | P | Nov. 17, 1903 | Nov. 17, 1903 | 33 Stat. 2324. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | Nov. 27, 1911 | May 29, 1911 | 37 Stat. 1721. |
| | UCC | Sept. 6, 1952 | June 18, 1957 | 6 UST 2731. |
| Czechoslovakia. | Pm | Apr. 27, 1927 | Mar. 1, 1927 | 45 Stat. 2906. |
| | UCC | Sept. 6, 1952 | Jan. 6, 1960 | 6 UST 2731. |
| Danzig | Pm | Apr. 7, 1934 | Apr. 7, 1934 | 48 Stat. 1737. |
| Denmark [3] | P | May 8, 1893 | May 8, 1893 | 28 Stat. 1219. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pmx | Dec. 9, 1920 | Dec. 9, 1920 | 41 Stat. 1810. |
| | Pxx | Feb. 4, 1952 | Feb. 4, 1952 | 66 Stat. C20. |
| | UCC | Sept. 6, 1952 | Feb. 9, 1962 | 6 UST 2731. |
| Dominican Republic. | MCC | Jan. 27, 1902 | June 30, 1908 | 35 Stat. 1934. |
| | BAC | Aug. 11, 1910 | Oct. 31, 1912 | 38 Stat. 1785. |
| Ecuador | BAC | ....do.... | Aug. 31, 1914 | Do. |
| | UCC | Sept. 6, 1952 | June 5, 1957 | 6 UST 2731. |
| El Salvador | MCC | Jan. 27, 1902 | June 30, 1908 | 35 Stat. 1934. |
| Fiji | UCC | Sept. 6, 1952 | May 4, 1963 | 6 UST 2731. |
| Finland | Pm | Dec. 15, 1928 | Jan. 1, 1929 | 45 Stat. 2980. |
| | Pxx | Nov. 16, 1951 | Nov. 16, 1951 | 66 Stat. C5. |
| | UCC | Sept. 6, 1952 | Apr. 16, 1963 | 6 UST 2731. |
| France [6] | P | July 1, 1891 | July 1, 1891 | 27 Stat. 981. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | May 24, 1918 | May 24, 1918 | 40 Stat. 1784. |

PROCLAMATIONS, TREATIES, AND CONVENTIONS ESTABLISHING COPYRIGHT RELATIONS BETWEEN THE UNITED STATES AND OTHER COUNTRIES—CONTINUED

| Country | Document | Date of document | Date effective | Reference |
|---|---|---|---|---|
| France—Cont. | Pxx | Mar. 27, 1947 | Mar. 27, 1947 | 61 Stat. 1057. |
| | Po | May 26, 1950 | Dec. 29, 1950 | 64 Stat. A413. |
| | UCC | Sept. 6, 1952 | Jan. 14, 1956 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| German Dem. Rep. | UCC | Sept. 6, 1952 | Oct. 5, 1973 | 6 UST 2731. |
| Germany [3] | P | Apr. 15, 1892 | Apr. 15, 1892 | 27 Stat. 1021. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | Dec. 8, 1910 | Dec. 8, 1910 | 36 Stat. 2761. |
| | Px | May 25, 1922 | May 25, 1922 | 42 Stat. 2271. |
| Germany, Fed. Rep. | Pxx | July 12, 1967 | July 12, 1967 | 18 UST 2369. |
| | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 24, 1974 | 25 UST 1341. |
| Ghana | UCC | Sept. 6, 1952 | Aug. 22, 1962 | 6 UST 2731. |
| Greece | Pm | Feb. 23, 1932 | Mar. 1, 1932 | 47 Stat. 2502. |
| | UCC | Sept. 6, 1952 | Aug. 24, 1963 | 6 UST 2731. |
| Guatemala | MCC | Jan. 27, 1902 | June 30, 1908 | 35 Stat. 1934. |
| | BAC | Aug. 11, 1910 | Mar. 28, 1913 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Oct. 28, 1964 | 6 UST 2731. |
| Haiti | BAC | Aug. 11, 1910 | Nov. 27, 1919 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Holy See | UCC | .....do..... | Oct. 5, 1955 | Do. |
| Honduras | MCC | Jan. 27, 1902 | June 30, 1908 | 35 Stat. 1934. |
| | BAC | Aug. 11, 1910 | Apr. 27, 1914 | 38 Stat. 1785. |
| Hungary [3] | Cm [7] | Jan. 30, 1912 | Oct. 16, 1912 | 37 Stat. 1631. |
| | Px | June 3, 1922 | June 3, 1922 | 42 Stat. 2277. |
| | T [8,9] | Feb. 10, 1947 | Sept. 15, 1947 | 61 Stat. 2065. |
| | UCC | Sept. 6, 1952 | Jan. 23, 1971 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| Iceland | UCC | Sept. 6, 1952 | Dec. 18, 1956 | 6 UST 2731. |
| India [1, 10] | Pm | Oct. 21, 1954 | Aug. 15, 1947 | 5 UST 2529. |
| | UCC | Sept. 6, 1952 | Jan. 21, 1958 | 6 UST 2731. |
| Ireland [1] | Pm [11] | Sept. 28, 1929 | Oct. 1, 1929 | 46 Stat. 3005. |
| | UCC | Sept. 6, 1952 | Jan. 20, 1959 | 6 UST 2731. |
| Israel [12] | Pm | May 4, 1950 | May 15, 1948 | 64 Stat. A402. |
| | UCC | Dec. 16, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Italy | P [13] | Oct. 31, 1892 | Oct. 31, 1892 | 27 Stat. 1043. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm [13] | May 1, 1915 | May 1, 1915 | 39 Stat. 1725. |
| | Px | June 3, 1922 | June 3, 1922 | 42 Stat. 2276. |
| | T [8,14] | Feb. 10, 1947 | Sept. 15, 1947 | 61 Stat. 1245. |
| | Pxx | Dec. 12, 1951 | Dec. 12, 1951 | 66 Stat. C13. |
| | UCC | Sept. 6, 1952 | Jan. 24, 1957 | 6 UST 2731. |
| Japan | C [15] | Nov. 10, 1905 | May 10, 1906 | 34 Stat. 2890. |
| | C [16] | May 19, 1908 | Aug. 16, 1908 | 35 Stat. 2044. |
| | T [17] | Sept. 8, 1951 | Apr. 28, 1952 | 3 UST 3169. |
| | Pm [18] | Nov. 10, 1953 | .....do..... | 5 UST 118. |
| | UCC | Sept. 6, 1952 | Apr. 28, 1956 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Oct. 19, 1977 | 25 UST 1341. |
| Kenya | UCC | Sept. 6, 1952 | Sept. 7, 1966 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| Korea | C [19] | May 19, 1908 | Aug. 16, 1908 | 35 Stat. 2041. |
| Laos | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Lebanon | UCC | .....do..... | Oct. 17, 1959 | Do. |
| Liberia | UCC | .....do..... | July 27, 1956 | Do. |

PROCLAMATIONS, TREATIES, AND CONVENTIONS ESTABLISHING COPYRIGHT RELATIONS BETWEEN THE UNITED STATES AND OTHER COUNTRIES—CONTINUED

| Country | Document | Date of document | Date effective | Reference |
|---|---|---|---|---|
| Liechtenstein | UCC | .....do..... | Jan. 22, 1959 | Do. |
| Luxembourg | P | June 29, 1910 | June 29, 1910 | 36 Stat. 2716. |
| | Pm | June 14, 1911 | June 29, 1910 | 37 Stat. 1689. |
| | UCC | Sept. 6, 1952 | Oct. 15, 1955 | 6 UST 2731. |
| Malawi | UCC | Sept. 6, 1952 | Oct. 26, 1965 | 6 UST 2731. |
| Malta | UCC | Sept. 6, 1952 | Nov. 19, 1968 | 6 UST 2731. |
| Mauritius | UCC | Sept. 6, 1952 | Mar. 12, 1968 | 6 UST 2731. |
| Mexico | P | Feb. 27, 1896 | Feb. 27, 1896 | 29 Stat. 877. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | UCC | Sept. 6, 1952 | May 12, 1957 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Oct. 31, 1975 | 25 UST 1341. |
| Monaco | Pm | Oct. 15, 1952 | Oct. 15, 1952 | 67 Stat. C16. |
| | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Dec. 13, 1974 | 25 UST 1341. |
| Morocco | UCC | Sept. 6, 1952 | May 8, 1972 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Jan. 28, 1976 | 25 UST 1341. |
| Netherlands and Possessions. [20] | P | Nov. 20, 1899 | Nov. 20, 1899 | 31 Stat. 1961. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | Feb. 26, 1923 | Oct. 2, 1922 | 42 Stat. 2297. |
| New Zealand [1] | Pm | Feb. 9, 1917 | Dec. 1, 1916 | 39 Stat. 1815. |
| | Px | May 25, 1922 | May 25, 1922 | 42 Stat. 2274. |
| | Pxx | Apr. 24, 1947 | Apr. 24, 1947 | 61 Stat. 1065. |
| | Po | May 26, 1950 | Dec. 29, 1950 | 64 Stat. A414. |
| | UCC | Sept. 6, 1952 | Sept. 11, 1964 | 6 UST 2731. |
| Nicaragua | MCC | Jan. 27, 1902 | June 30, 1908 | 35 Stat. 1934. |
| | BAC | Aug. 11, 1910 | Dec. 15, 1913 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Aug. 16, 1961 | 6 UST 2731. |
| Nigeria | UCC | .....do..... | Feb. 14, 1962 | Do. |
| Norway | P | July 1, 1905 | July 1, 1905 | 34 Stat. 3111. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | June 14, 1911 | Sept. 9, 1910 | 37 Stat. 1687. |
| | UCC | Sept. 6, 1952 | Jan. 23, 1963 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | Aug. 7, 1974 | 25 UST 1341. |
| Pakistan | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| Palestine (excluding Trans-Jordan). | Pm | Sept. 29, 1933 | Oct. 1, 1933 | 48 Stat. 1713. 58 Stat. 1129. |
| | Pxx [12] | Mar. 10, 1944 | Mar. 10, 1944 | 64 Stat. A412. |
| | Po [12] | May 26, 1950 | Dec. 29, 1950 | |
| Panama | BAC | Aug. 11, 1910 | Nov. 25, 1913 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Oct. 17, 1962 | 6 UST 2731. |
| Paraguay | BAC | Aug. 11, 1910 | Sept. 20, 1917 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Mar. 11, 1962 | 6 UST 2731. |
| Peru | BAC | Aug. 11, 1910 | Apr. 30, 1920 | 38 Stat. 1785. |
| | UCC | Sept. 6, 1952 | Oct. 16, 1963 | 6 UST 2731. |
| Philippines | Pm | Oct. 21, 1948 | Oct. 21, 1948 | 62 Stat. 1568. |
| | UCC [21] | Sept. 6, 1952 | | 6 UST 2731. |
| Poland | Pm | Feb. 14, 1927 | Feb. 16, 1927 | 44 Stat. 2634. |
| | UCC | Sept. 6, 1952 | Mar. 10, 1977 | 6 UST 2731 |
| | UCC rev. | July 24, 1971 | Mar. 10, 1977 | 25 UST 1341 |
| Portugal | P | July 20, 1893 | July 20, 1893 | 28 Stat. 1222. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | UCC | Sept. 6, 1952 | Dec. 25, 1956 | 6 UST 2731. |
| Rumania | Pm [22] | May 14, 1928 | May 14, 1928 | 45 Stat. 2949. |
| | T [8,23] | Feb. 10, 1947 | Sept. 15, 1947 | 61 Stat. 1757. |

PROCLAMATIONS, TREATIES, AND CONVENTIONS ESTABLISHING COPYRIGHT RELATIONS BETWEEN THE UNITED STATES AND OTHER COUNTRIES—CONTINUED

| Country | Document | Date of document | Date effective | Reference |
|---|---|---|---|---|
| Senegal | UCC | Sept. 6, 1952 | July 10, 1974 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| South Africa [1] | Pm | June 26, 1924 | July 1, 1924 | 43 Stat. 1957. |
| Spain [5] | P [24] | July 10, 1895 | July 10, 1895 | 29 Stat. 871. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | Oct. 10, 1934 | Oct. 10, 1934 | 49 Stat. 3420. |
| | UCC | Sept. 6, 1952 | Sept. 16, 1955 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| Sweden | P | May 26, 1911 | June 1, 1911 | 37 Stat. 1682. |
| | Pm | Feb. 27, 1920 | Feb. 1, 1920 | 41 Stat. 1787. |
| | UCC | Sept. 6, 1952 | July 1, 1961 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| Switzerland | P | July 1, 1891 | July 1, 1891 | 27 Stat. 981. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| | Pm | Nov. 22, 1924 | July 1, 1923 | 43 Stat. 1976. |
| | UCC | Sept. 6, 1952 | Mar. 30, 1956 | 6 UST 2731. |
| Thailand | T [25] | Dec. 16, 1920 | Sept. 1, 1921 | 42 Stat. 1928. |
| | T [25] | Nov. 13, 1937 | Oct. 1, 1938 | 53 Stat. 1731. |
| | T [25] | May 29, 1966 | June 8, 1968 | 19 UST 5843. |
| Tunisia | P | Oct. 4, 1912 | Oct. 4, 1912 | 37 Stat. 1765. |
| | UCC | Sept. 6, 1952 | June 19, 1969 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | June 10, 1975 | 25 UST 1341. |
| Union of Soviet Socialist Reps. | UCC | Sept. 6, 1952 | May 27, 1973 | 6 UST 2731. |
| United Kingdom. | UCC | Sept. 6, 1952 | Sept. 27, 1957 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| United Kingdom and Possessions. [1] | P | July 1, 1891 | July 1, 1891 | 27 Stat. 981. |
| | P | Apr. 9, 1910 | July 1, 1909 | 36 Stat. 2685. |
| United Kingdom and the British Dominions, Colonies and Possessions with the exception of Canada, Australia, New Zealand, South Africa and Newfoundland. [1] | Pm | Jan. 1, 1915 | Jan. 1, 1915 | 38 Stat. 2044. |
| | Pmx | Apr. 10, 1920 | Feb. 2, 1920 | 41 Stat. 1790. |
| United Kingdom, certain British Territories [1] and Palestine [12] | Pxx | Mar. 10, 1944 | Mar. 10, 1944 | 58 Stat. 1129. |
| | Po | May 26, 1950 | Dec. 29, 1950 | 64 Stat. A412. |
| Uruguay | BAC | Aug. 11, 1910 | Dec. 17, 1919 | 38 Stat. 1785. |
| Venezuela | UCC | Sept. 6, 1952 | Sept. 30, 1966 | 6 UST 2731. |
| Yugoslavia | UCC | Sept. 6, 1952 | May 11, 1966 | 6 UST 2731. |
| | UCC rev. | July 24, 1971 | July 10, 1974 | 25 UST 1341. |
| Zambia | UCC | Sept. 6, 1952 | June 1, 1965 | 6 UST 2731. |

[1] The proclamations of July 1, 1891 and April 9, 1910 apply to "Great Britain and the British possessions", but the proclamations of January 1, 1915 and April 10, 1920 specifically except Australia, Canada, Newfoundland, New Zealand and South Africa. The proclamations of March 10, 1944 and May 26, 1950 enumerate the various British territories to which they apply, excluding the areas specifically excepted in the proclamations of 1915 and 1920. Proclamations establishing individual copyright relations with Australia, Canada, Ireland, New Zealand, Palestine, and South Africa are listed separately. (See also footnotes 2, 11, 12.)

The proclamation of December 27, 1923 regarding Canada is considered as applying to Newfoundland at the present time.

The copyright proclamations of July 1, 1891, April 9, 1910, January 1, 1915, April 10, 1920, and March 10, 1944 regarding Great Britain and possessions each applied when issued to the areas now within the boundaries of Burma, Ceylon, India, and Pakistan. See footnote 10 with respect to India. No announcement has been made as to the application of the proclamations to Burma, Ceylon, and Pakistan since they acquired their new status.

[2] The proclamation of December 29, 1949 extends for one year from its date the period of time for compliance by citizens of Australia with the conditions and formalities prescribed by the copyright law of the United States.

[3] The United States entered into treaties restoring friendly relations with Austria, Germany, and Hungary at Vienna on August 24, 1921 (42 Stat. 1946; TS 659); at Berlin on August 25, 1921 (42 Stat. 1939; TS 658) and at Budapest on August 29, 1921 (42 Stat. 1951; TS 610), respectively. By virtue of these treaties the United States became entitled to the benefits of the provisions relative to copyright protection in the treaties of peace signed by Austria, Germany and Hungary at Saint-Germain-en-Laye on September 10, 1919, at Versailles on June 28, 1919, and at Trianon on June 4, 1920, respectively. (See also footnote 7.)

[4] The Treaty of Friendship, Commerce and Navigation (Art. IX) together with the Protocol (par. 5) signed at Nanking November 4, 1946, and the reservation and understandings in the ratification by the United States (TIAS 1871) govern present copyright relations between the United States and China. Although Article XXIX of this Treaty lists the earlier Treaty as to Commercial Relations signed at Shanghai October 8, 1903 (33 Stat. 2208, TS 430) as superseded by the 1946 Treaty, the ratification by the United States provides in part that the 1946 Treaty is subject to the following reservation and understandings: "The Government of the United States of America does not accept Section 5(c) of the Protocol relating to protection against translations of literary and artistic works, and with the understanding that United States interests in this respect will be interpreted in accordance with the provisions of the Treaty as to Commercial Relations signed at Shanghai, October 8, 1903, until further negotiations and agreement concerning translations are forthcoming."

[5] Treaties and Conventions containing provisions relative to copyright protection in territories ceded to the United States are not included in this table: for example, the Treaty of Peace with Spain signed at Paris December 10, 1898 (30 Stat. 1754; TS 343), Art. XIII (see also footnote 25); and the Convention with Denmark for the Cession to the United States of the Danish West Indies, signed at New York, August 4, 1916 (39 Stat. 1706; TS 629), Art. 9.

[6] The Department of State has made no announcement as to the application of the proclamations of July 1, 1891, April 9, 1910, May 24, 1918, and March 27, 1947 to Cambodia, Laos, and Viet-Nam.

[7] Copyright Convention signed at Budapest January 30, 1912 (TS 571). This Convention was continued in force following World War I by notice given by the United States on May 27, 1922 to Hungary in pursuance of Article 224 of the Treaty of Trianon concluded on June 4, 1920 (III Redmond 3539), to the benefits of which the United States became entitled by the Treaty of August 29, 1921 establishing friendly relations between the United States and Hungary (42 Stat. 1951; TS 660). The Convention of 1912 was kept in force or revived following World War II by notice given on March 9, 1948 by the United States to Hungary pursuant to Article 10 of the Treaty of Peace with Hungary (61 Stat. 2065; Department of State Bulletin March 21, 1948; p. 382).

[8] Treaty of Peace with Hungary (Annex IV A) dated at Paris February 10, 1947 (TIAS 1651).

[9] Except with respect to rights of third parties, the provisions relating to protection of copyright in the annexes to the Treaties of Peace with Hungary, Italy, and Rumania dated at Paris February 10, 1947, are bilateral in character. For example, the provisions of Annex IV A of the Treaty of Peace with Hungary, relate in general, to copyright relations between Hungary on the one part, and each of the other ratifying or adhering States, on the other part. Those provisions do not pertain to copyright relations between those other States, except for third party rights (see also footnotes 13 and 19). Annex IV of the Treaty of Peace with Bulgaria dated at Paris February 10, 1947 (61 Stat. 1915; TIAS 1650) contains similar provisions; however, there are no general copyright relations between the United States and Bulgaria.

[10] The proclamation of October 21, 1954 affirms the existence of copyright relations with India after August 15, 1947 (the effective date of the Indian Independence Act), as before that date (see footnote 1).

[11]The Department of State has determined that the entry into force on April 18, 1949 of the Republic of Ireland Act had no effect upon the proclamation of September 28, 1929 regarding the Irish Free State (Eire). Copyright relations with Ireland are therefore governed by that proclamation (see also footnote 1).

[12]The proclamations of March 10, 1944 and May 26, 1950 regarding Great Britain and possessions, also specifically refer to Palestine, excluding Trans-Jordan.

[13]The exchanges of notes between the United States and Italy, on the basis of which the proclamations of October 31, 1892 and May 1, 1915 were issued, were the subject of a note delivered on March 12, 1948 to the Italian Foreign Office by the American Embassy at Rome with respect to prewar bilateral treaties and other international agreements which the United States desired to keep in force or revive pursuant to Article 44 of the Treaty of Peace with Italy. The note stated in part "that the Government of the United States of America wishes to include the reciprocal copyright arrangement between the United States and Italy effected pursuant to the exchange of notes signed at Washington October 28, 1892 and the exchange of notes signed at Washington September 2, 1914, February 12, March 4 and March 11, 1915, among the prewar bilateral treaties and other international agreements with Italy which the United States desires to keep in force or revive. Accordingly, it is understood that the aforementioned arrangement will continue in force and that the Government of each country will extend to the nationals of the other country treatment as favorable with respect to copyright as was contemplated at the time the arrangement was entered into by the two countries". (Department of State Bulletin, April 4, 1948, p. 455.)

[14]Treaty of Peace with Italy (Annex XV A) dated at Paris January 10, 1947 (TIAS 1648).

[15]Copyright Convention, signed at Tokyo November 10, 1905 (TS 450).

This convention is considered as having been abrogated on April 22, 1953, pursuant to the provisions of Article 7 of the Treaty of Peace with Japan signed at San Francisco September 8, 1951 (TIAS 2490), since it was not included in the notification which was given on behalf of the United States Government to the Japanese Government on April 22, 1953, indicating the prewar bilateral treaties or conventions which the United States wished to continue in force or revive.

[16]Convention between the United States and Japan for reciprocal protection of inventions, designs, trademarks and copyrights in China and other countries where either contracting party may exercise extraterritorial jurisdiction, signed at Washington May 19, 1908 (TS 507).

This convention is considered as having been abrogated on April 22, 1953, pursuant to the provisions of Article 7 of the Treaty of Peace with Japan signed at San Francisco September 8, 1951 (TIAS 2490), since it was not included in the notification which was given on behalf of the United States Government to the Japanese Government on April 22, 1953, indicating the prewar bilateral treaties or conventions which the United States wished to continue in force or revive.

[17]Treaty of Peace with Japan (Articles 12, 14 and 15) signed at San Francisco September 8, 1951 (TIAS 2490). (See also footnotes 15, 16 and 19.)

[18]The proclamation of November 10, 1953 extends benefits under the copyright law for a period of four years from the coming into force of the Treaty of Peace with Japan (TIAS 2490). That period expired April 28, 1956.

[19]Copyright Convention with Japan for reciprocal protection in Korea of inventions, designs, trademarks and copyrights signed at Washington May 19, 1908 (TS 506).

This convention is considered as having been abrogated on April 22, 1953, pursuant to the provisions of Article 7 of the Treaty of Peace with Japan signed at San Francisco September 8, 1951 (TIAS 2490), since it was not included in the notification which was given on behalf of the United States Government to the Japanese Government on April 22, 1953, indicating the prewar bilateral treaties or conventions which the United States wished to continue in force or revive.

[20]The Department of State has made no announcement as to the application of the proclamations of November 20, 1899, April 9, 1910 and February 26, 1923 to Indonesia since it acquired its new status.

[21]An instrument of accession was deposited by the Philippine Government August 19, 1955. In a communication received by the State Department January 17, 1956, UNESCO stated that by a note dated November 14, 1955, the Philippine Government informed the Director General that "the President of the * * * Philippines has directed the withdrawal of the * * * accession * * * to the Universal Copyright Convention prior to the date of November 19, 1955, at which time the Convention would become effective" for the Philippines. The Director General notified the Philippine Government that he "proposed to submit their communication to the States concerned, upon whom it is incumbent to declare what legal inference they intend to draw from it."

[22]In a note delivered February 26, 1948 to the Rumanian Minister for Foreign Affairs by the American Minister at Bucharest with respect to prewar bilateral treaties and other international agreements which the United States desired to keep in force or revive pursuant to Article 10 of the Treaty of Peace with Rumania (see footnotes 9 and 24), the following statement was made regarding the proclamation of May 14, 1928 and the exchange of notes on which it is based: "It shall be understood that the reciprocal copyright arrangement between the United States and Rumania effected pursuant to the exchange of notes signed at Bucharest May 13 and October 13, 1928 and at Washington May 12 and 19, 1928 and the proclamation issued May 14, 1928 by the President of the United States of America will continue in force." (Department of State Bulletin, March 14, 1948, p. 356).

[23]Treaty of Peace with Rumania, dated at Paris, February 10, 1947 (TIAS 1649).

[24]The proclamation of July 10, 1895, regarding Spain was based upon an arrangement between the United States and Spain effected by an exchange of notes signed at Washington July 6 and 15, 1895. An agreement restoring the arrangement of July 6 and 15, 1895 was effected by an exchange of notes signed at Madrid January 29 and November 18 and 26, 1902 (II Malloy 1710), following the Treaty of Peace between the United States and Spain signed at Paris December 10, 1898 (30 Stat. 1754; TS 343). The latter treaty also contains in Article XIII the following provisions: "The rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba, and in Puerto Rico, the Philippines and other ceded territories, at the time of the exchange of ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works, not subversive of public order in the territories in question, shall continue to be admitted free of duty into such territories, for the period of ten years, to be reckoned from the date of the exchange of ratifications of this treaty."

[25]Treaty of friendship, commerce and navigation, protocol and exchanges of notes, signed at Bangkok November 13, 1937 (Art. 9 of the Treaty) (TS 940). This treaty replaces the treaty of friendship, commerce and navigation between the United States and Thailand signed at Washington December 16, 1920 (TS 655), Article XII of which contains provisions relating to copyright protection. The treaty of amity and economic relations, with three exchanges of notes between the United States and Thailand signed at Bangkok May 29, 1966 (TIAS 6540) replaces the treaty of November 13, 1937. Article V.2 contains provisions relating to copyright.

### Proc. No. 3792. Copyright Extension: Germany

Proc. No. 3792, July 12, 1967, 32 F.R. 10341, provided:

Whereas the President is authorized, in accordance with the conditions prescribed in Section 9 of Title 17 of the United States Code which includes the provisions of the act of Congress approved March 4, 1909, 35 Stat. 1075, as amended by the act of September 25, 1941, 55 Stat. 732, to grant an extension of time for fulfillment of the conditions and formalities prescribed by the copyright laws of the United States of America, with respect to works first produced or published outside the United States of America and subject to copyright or to renewal of copyright under the laws of the United States of America, by nationals of countries which accord substantially equal treatment to citizens of the United States of America; and

Whereas satisfactory official assurances have been received that, since April 15, 1892, citizens of the United States have been entitled to obtain copyright in Germany for their works on substantially the same basis as German citizens without the need of complying with any formalities, provided such works secured protection in the United States; and

Whereas, pursuant to Article 2 of the Law No. 8, Industrial, Literary and Artistic Property Rights of Foreign Nations and Nationals, promulgated by the Allied High Commission for Germany on October 20, 1949, literary or artistic property rights in Germany owned by United States nationals at the commencement of or during the state of war between Germany and the United States of America which were transferred, seized, requisitioned, revoked or otherwise impaired by war measures, whether legislative, judicial or administrative, were, upon request made prior to October 3, 1950, restored to such United States nationals or their legal successors; and

WHEREAS, pursuant to Article 5 of the aforesaid law, any literary or artistic property right in Germany owned by a United States national at the commencement of or during the state of war between Germany and the United States of America was, upon request made prior to October 3, 1950, extended in term for a period corresponding to the inclusive time from the date of the commencement of the state of war, or such later date on which such right came in existence, to September 30, 1949; and

WHEREAS, by virtue of a proclamation by the President of the United States of America dated May 25, 1922, 42 Stat. 2271, German citizens are and have been entitled to the benefits of the act of Congress approved March 4, 1909, 35 Stat. 1075, as amended, including the benefits of Section 1(e) of the aforementioned Title 17 of the United States Code [section 1(e) of former Title 17]; and

WHEREAS, a letter of February 6, 1950, from the Chancellor of the Federal Republic of Germany to the Chairman of the Allied High Commission for Germany established the mutual understanding that reciprocal copyright relations continued in effect between the Federal Republic of Germany and the United States of America:

NOW, THEREFORE, I, LYNDON B. JOHNSON, President of the United States of America, by virtue of the authority vested in me by Section 9 of Title 17 of the United States Code [section 9 of former Title 17], do declare and proclaim:

(1) That, with respect to works first produced or published outside the United States of America: (a) where the work was subject to copyright under the laws of the United States of America on or after September 3, 1939, and on or before May 5, 1956, by an author or other owner who was then a German citizen; or (b) where the work was subject to renewal of copyright under the laws of the United States of America on or after September 3, 1939, and on or before May 5, 1956, by an author or other person specified in Sections 24 and 25 of the aforesaid Title 17 [sections 24 and 25 of former Title 17], who was then a German citizen, there has existed during several years of the aforementioned period such disruption and suspension of facilities essential to compliance with conditions and formalities prescribed with respect to such works by the copyright law of the United States of America as to bring such works within the terms of Section 9(b) of the aforesaid Title 17 [section 9(b) of former Title 17]; and

(2) That, in view of the reciprocal treatment accorded to citizens of the United States by the Federal Republic of Germany, the time within which persons who are presently German citizens may comply with such conditions and formalities with respect to such works is hereby extended for one year after the date of this proclamation.

It shall be understood that the term of copyright in any case is not and cannot be altered or affected by this proclamation. It shall also be understood that, as provided by Section 9(b) of Title 17, United States Code [section 9(b) of former Title 17], no liability shall attach under that title for lawful uses made or acts done prior to the effective date of this proclamation in connection with the above-described works, or with respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation or performance of any such works.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of July in the year of our Lord nineteen hundred and sixty-seven, and of the Independence of the United States of America the one hundred and ninety-second.

LYNDON B. JOHNSON.

PRESIDENTIAL PROCLAMATIONS ISSUED UNDER PREDECESSOR PROVISIONS

Section 104 of Pub. L. 94-553 provided that: "All proclamations issued by the President under section 1(e) or 9(b) of title 17 as it existed on December 31, 1977, or under previous copyright statutes of the United States, shall continue in force until terminated, suspended, or revised by the President."

## § 105. Subject matter of copyright: United States Government works

Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Scope of the Prohibition.** The basic premise of section 105 of the bill is the same as that of section 8 of the present law [section 8 of former title 17]—that works produced for the U.S. Government by its officers and employees should not be subject to copyright. The provision applies the principle equally to unpublished and published works.

The general prohibition against copyright in section 105 applies to "any work of the United States Government," which is defined in section 101 as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." Under this definition a Government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee. Although the wording of the definition of "work of the United States Government" differs somewhat from that of the definition of "work made for hire," the concepts are intended to be construed in the same way.

A more difficult and far-reaching problem is whether the definition should be broadened to prohibit copyright in works prepared under U.S. Government contract or grant. As the bill is written, the Govrnment agency concerned could determine in each case whether to allow an independent contractor or grantee, to secure copyright in works prepared in whole or in part with the use of Government funds. The argument that has been made against allowing copyright in this situation is that the public should not be required to pay a "double subsidy," and that it is inconsistent to prohibit copyright in works by Government employees while permitting private copyrights in a growing body of works created by persons who are paid with Government funds. Those arguing in favor of potential copyright protection have stressed the importance of copyright as an incentive to creation and dissemination in this situation, and the basically different policy considerations, applicable to works written by Government employees and those applicable to works prepared by private organizations with the use of Federal funds.

The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be

withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. Works of the governments of most other countries are copyrighted. There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use of its works abroad.

The effect of section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright in it or restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term "work of the United States Government" does not mean that a work falling within the definition of that term is the property of the U.S. Government.

LIMITED EXCEPTION FOR NATIONAL TECHNICAL INFORMATION SERVICE

At the House hearings in 1975 the U.S. Department of Commerce called attention to its National Technical Information Service (NTIS), which has a statutory mandate, under Chapter 23 [§ 1151 et seq.] of Title 15 of the U.S. Code, to operate a clearinghouse for the collection and dissemination of scientific, technical and engineering information. Under its statute, NTIS is required to be as self-sustaining as possible, and not to force the general public to bear publishing costs that are for private benefit. The Department urged an amendment to section 105 that would allow it to secure copyright in NTIS publications both in the United States and abroad, noting that a precedent exists in the Standard Reference Data Act (15 U.S.C. § 290(e) [§ 290e]).

In response to this request the Committee adopted a limited exception to the general prohibition in section 105, permitting the Secretary of Commerce to "secure copyright for a limited term not to exceed five years, on behalf of the United States as author or copyright owner" in any NTIS publication disseminated pursuant to 15 U.S.C. Chapter 23 [§ 1151 et seq.]. In order to "secure copyright" in a work under this amendment the Secretary would be required to publish the work with a copyright notice, and the five-year term would begin upon the date of first publication.

**Proposed Saving Clause.** Section 8 of the statute now in effect [section 8 of former title 17] includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. This provision serves a real purpose in the present law because of the ambiguity of the undefined term "any publication of the United States Government." Section 105 of the bill, however, uses the operative term "work of the United States Government" and defines it in such a way that privately written works are clearly excluded from the prohibition; accordingly, a saving clause becomes superfluous.

Retention of a saving clause has been urged on the ground that the present statutory provision is frequently cited, and that having the provision expressly stated in the law would avoid questions and explanations. The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way. The question of use of copyrighted material in documents published by the Congress and its Committees is discussed below in connection with section 107.

**Works of the United States Postal Service.** The intent of section 105 [this section] is to restrict the prohibition against Government copyright to works written by employees of the United States Government within the scope of their official duties. In accordance with the objectives of the Postal Reorganization Act of 1970 [Pub. L. 91-375, which enacted title 39, Postal Service], this section does not apply to works created by employees of the United States Postal Service. In addition to enforcing the criminal statutes proscribing the forgery or counterfeiting of postage stamps, the Postal Service could, if it chooses, use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services (for example, in philatelic publications and catalogs, in general advertising, in art reproductions, in textile designs, and so forth). However, any copyright claimed by the Postal Service in its works, including postage stamp designs, would be subject to the same conditions, formalities, and time limits as other copyrightable works.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 290e.

**§ 106. Exclusive rights in copyrighted works**

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**General Scope of Copyright.** The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106. These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications,

or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118", and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

**Rights of Reproduction, Adaptation, and Publication.** The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. § 1).

*Reproduction.*—Read together with the relevant definitions in section 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114.

"Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

*Preparation of Derivative Works.*—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

*Use in Information Storage and Retrieval Systems.*—As section 117 declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

*Public Distribution.*—Clause (3) of section 106 establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 109 makes clear, however, the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

**Rights of Public Performance and Display.** *Performing Rights and the "For Profit" Limitation.*—The right of public performance under section 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 106(4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114.

*Right of Public Display.*—Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works", including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."

**Definitions.** Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it re-

transmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 118.

To "perform" a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of "perform" in relation to "a motion picture or other audio visual work" is "to show its images in any sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need be maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly" in section 101 [section 101 of this title], a performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp.* v. *Wyatt*, 21 C.O.Bull. 203 (D.Md.1932), performances in "semipublic" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copy right control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in my [any] form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

### Federal Rules of Civil Procedure

Injunctions, see rule 65, Title 28, Appendix, Judiciary and Judicial Procedure.

### Cross References

Action for infringement of copyright, see section 501 of this title.

Common law rights, see section 301 of this title.

Copyright as distinct from property in object copyrighted, see section 202 of this title.

Copyright not capital asset, see section 1221 of Title 26, Internal Revenue Code.

Duration of copyright, see section 301 et seq. of this title.

Fines and penalties for wilful infringement, see section 506 of this title.

Government publications as not copyrightable, see section 105 of this title.

Immoral and scandalous trade-marks, registrability, see section 1052 of Title 15, Commerce and Trade.

Jurisdiction of district courts of actions—

- Arising under copyright laws, see section 1338 of Title 28, Judiciary and Judicial Procedure.
- Founded on diversity of citizenship, see section 1332 of Title 28.

Preemption of other laws relating to exclusive rights within the general scope of copyright, see section 301 of this title.

Proclamation by President granting foreign authors copyright protection, see section 104 of this title.

Power of Congress to grant authors exclusive right to their writings, see Const. Art. 1, § 8, cl. 8.

Remedies for infringement of copyright, see sections 502, 503, 504, 505 of this title.

Renewal of copyright, see section 304 of this title.

Transfer of copyright, see sections 201 and 204 of this title.

Venue of action—

- Arising under act of Congress relating to copyrights, see section 1400 of Title 28, Judiciary and Judicial Procedure.
- Founded on diversity of citizenship jurisdiction, see section 1391 of Title 28.

### Section Referred to in Other Sections

This section is referred to in sections 107 to 110, 112 to 118, 201, 301, 501, 506, 602 of this title; title 2 section 170.

**§ 107. Limitations on exclusive rights: Fair use**

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**General Background of the Problem.** The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

These criteria are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use "by reproduction in copies or phonorecords or by any other means" is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use. Similarly, the newly-added reference to "multiple copies for classroom use" is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.

The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

**General Intention Behind the Provision.** The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

**Intention as to Classroom Reproduction.** Although the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself, most of the discussion of section 107 [this section] has centered around questions of classroom reproduction, particularly photocopying. The arguments on the question are summarized at pp. 30-31 of this Committee's 1967 report (H.R. Rep. No. 83, 90th Cong., 1st Sess.), and have not changed materially in the intervening years.

The Committee also adheres to its earlier conclusion, that "a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified." At the same time the Committee recognizes, as it did in 1967, that there is a "need for greater certainty and protection for teachers." In an effort to meet this need the Committee has not only adopted further amendments to section 107, but has also amended section 504(c) to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement. The latter amendments are discussed below in connection with Chapter 5 of the bill [§ 501 et seq. of this title].

In 1967 the Committee also sought to approach this problem by including, in its report, a very thorough discussion of "the considerations lying behind the four criteria listed in the amended section 107 [this section], in the context of typical classroom situations arising today." This discussion appeared on pp. 32–35 of the 1967 report, and with some changes has been retained in the Senate report on S. 22 (S. Rep. No. 94–473, pp. 63–65). The Committee has reviewed this discussion, and considers that it still has value as an analysis of various aspects of the problem.

At the Judiciary Subcommittee hearings in June 1975, Chairman Kastenmeier and other members urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material. The response to these suggestions was positive, and a number of meetings of three groups, dealing respectively with classroom reproduction of printed material, music, and audio-visual material, were held beginning in September 1975.

In a joint letter to Chairman Kastenmeier, dated March 19, 1976, the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, and of the Authors League of America, Inc., and the Association of American Publishers, Inc., stated:

> You may remember that in our letter of March 8, 1976 we told you that the negotiating teams representing authors and publishers and the Ad Hoc Group had reached tentative agreement on guidelines to insert in the Committee Report covering educational copying from books and periodicals under Section 107 of H.R. 2223 and S. 22 [this section], and that as part of that tentative agreement each side would accept the amendments to Sections 107 and 504 [this section and section 504 of this title] which were adopted by your Subcommittee on March 3, 1976.
>
> We are now happy to tell you that the agreement has been approved by the principals and we enclose a copy herewith. We had originally intended to translate the agreement into language suitable for inclusion in the legislative report dealing with Section 107 [this section], but we have since been advised by committee staff that this will not be necessary.
>
> As stated above, the agreement refers only to copying from books and periodicals, and it is not intended to apply to musical or audiovisual works.

The full text of the agreement is as follows:

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223 [this section]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill [this section]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. *Single Copying for Teachers*

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. *Multiple Copies for Classroom Use*

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

A. The copying meets the test of brevity and spontaneity as defined below; and,

B. Meets the cumulative effect test as defnied below; and

C. Each copy includes a notice of copyright.

*Definitions*

*Brevity*

(i) Poetry: (a) A complete poem is less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced

*Spontaneity*

(i) The copying is at the instance and inspiration of the individual teacher, and

(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

*Cumulative Effect*

(i) The copying of the material is for only one course in the school in which the copies are made.

(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. *Prohibitions as to I and II above*

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or

of teaching. These include workbooks, exercises, standarized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

(D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed March 19, 1976

Ad Hoc Committee on Copyright Law Revision:

By SHELDON ELLIOTT STEINBACH.

Author-Publisher Group:

Authors League of America:

By IRWIN KARP, *Counsel.*

Association of American Publishers, Inc.:

By ALEXANDER C. HOFFMAN.
*Chairman, Copyright Committee.*

In a joint letter dated April 30, 1976, representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision, wrote to Chairman Kastenmeier as follows:

During the hearings on H.R. 2223 in June 1975, you and several of your subcommittee members suggested that concerned groups should work together in developing guidelines which would be helpful to clarify Section 107 of the bill [this section].

Representatives of music educators and music publishers delayed their meetings until guidelines had been developed relative to books and periodicals. Shortly after that work was completed and those guidelines were forwarded to your subcommittee, representatives of the undersigned music organizations met, together with representatives of the Ad Hoc Committee on Copyright Law Revision to draft guidelines relative to music.

We are very pleased to inform you that the discussions thus have been fruitful on the guidelines which have been developed. Since private music teachers are an important factor in music education, due consideration has been given to the concerns of that group.

We trust that this will be helpful in the report on the bill to clarify Fair Use as it applies to music.

The text of the guidelines accompanying this letter is as follows:

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223 [this section]. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill [this section]. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. *Permissible Uses*

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2. (a) For academic purposes other than performance, multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.

(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. *Prohibitions*

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress.

The Committee appreciates and commends the efforts and the cooperative and reasonable spirit of the parties who achieved the agreed guidelines on books and periodicals and on music. Representatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level. However, the Committee notes that the Ad Hoc group did include representatives of higher education, that the stated "purpose of the . . . guidelines is to state the minimum and not the maximum standards of educational fair use"

and that the agreement acknowledges "there may be instances in which copying which does not fall within the guidelines . . . may nonetheless be permitted under the criteria of fair use."

The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers. The Committee expresses the hope that if there are areas where standards other than these guidelines may be appropriate, the parties will continue their efforts to provide additional specific guidelines in the same spirit of good will and give and take that has marked the discussion of the subject in recent months.

**Reproduction and Uses for Other Purposes.** The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

The fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under section 110(2) or 112, and not covered by the licensing provisions of section 118. In these cases the factors to be weighed in applying the criteria of this section would include whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and nature of the audience, the size and number of excerpts taken and, in the case of recordings made for broadcast, the number of copies reproduced and the extent of their reuse or exchange. The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circumstances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral readings (talking books), are not usually made by the publishers for commercial distribution. For the most part, such copies and phonorecords are made by the Library of Congress' Division for the Blind and Physically Handicapped with permission obtained from the copyright owners, and are circulated to blind persons through regional libraries covering the nation. In addition, such copies and phonorecords are made locally by individual volunteers for the use of blind persons in their communities, and the Library of Congress conducts a program for training such volunteers. While the making of multiple copies or phonorecords of a work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for blind persons would properly be considered a fair use under section 107.

A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of "fair use."

When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work.

The Committee has considered the question of publication, in Congressional hearings and documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use.

During the consideration of the revision bill in the 94th Congress it was proposed that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given separate treatment. It is argued that newsletters are particularly vulnerable to mass photocopying, and that most newsletters have fairly modest circulations. Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor in such cases: Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work.

The Committee has examined the use of excerpts from copyrighted works in the art work of calligraphers. The committee believes that a single copy reproduction of an excerpt from a copyrighted work by a calligrapher for a single client does not represent an infringement of copyright. Likewise, a single reproduction of excerpts from a copyrighted work by a student calligrapher or teacher in a learning situation would be a fair use of the copyrighted work.

The Register of Copyrights has recommended that the committee report describe the relationship between this section and the provisions of section 108 relating to reproduction by libraries and archives. The doctrine of fair use applies to library photocopying, and nothing contained in section 108 "in any way affects the right of fair use." No provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use.

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.

### Cross References

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted works, see section 106 of this title.

Remittance of statutory damages, see section 504 of this title.

Use of certain works in connection with noncommercial broadcasting, see section 118 of this title.

Use of material in conjunction with computers and similar information systems, see section 117 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 106, 108, 117, 118, 501, 504 of this title.

## § 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a

library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and (c), or with respect to pictorial or graphic works published as illustrations, dia-

grams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

(i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2546.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Notwithstanding the exclusive rights of the owners of copyright, section 108 provides that under certain conditions it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce or distribute not more than one copy or phonorecord of a work, provided (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage and (2) the collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field, and (3) the reproduction or distribution of the work includes a notice of copyright.

Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.

The reference to "indirect commercial advantage" has raised questions as to the status of photocopying done by or for libraries or archival collections within industrial, profitmaking, or proprietary institutions (such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc.).

There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108(g)(1) and (2). Under section 108, a library in a profitmaking organization would not be authorized to:

(a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or

(b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or

(c) use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.

Moreover, a library in a profitmaking organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff.

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108 even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the reproduction or distribution was not "systematic." These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantage," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profitmaking motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.

The rights of reproduction and distribution under section 108 apply in the following circumstances:

**Archival Reproduction.** Subsection (b) authorizes the reproduction and distribution of a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security, or for deposit for research use in another library or archives, if the copy or phonorecord reproduced is currently in the collections of the first library or archives. Only unpublished works could be reproduced under this exemption, but the right would extend to any type of work, including photographs, motion pictures and sound recordings. Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

**Replacement of Damaged Copy.** Subsection (c) authorizes the reproduction of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price. The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

**Articles and Small Excerpts.** Subsection (d) authorizes the reproduction and distribution of a copy of not more than one article or other contribution to a copyrighted collection or periodical issue, or of a copy or phonorecord of a small part of any other copyrighted work. The copy or phonorecord may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purposes other than private study, scholarship or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and includes in its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

**Out-of-Print Works.** Subsection (e) authorizes the reproduction and distribution of a copy or phonorecord of an entire work under certain circumstances, if it has been established that a copy cannot be obtained at a fair price. The copy may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to

the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purpose other than private study, scholarship, or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

**General Exemptions.** Clause (1) of subsection (f) specifically exempts a library or archives or its employees from liability for the unsupervised use of reproducing equipment located on its premises, provided that the reproducing equipment displays a notice that the making of a copy may be subject to the copyright law. Clause (2) of subsection (f) makes clear that this exemption of the library or archives does not extend to the person using such equipment or requesting such copy if the use exceeds fair use. Insofar as such person is concerned the copy or phonorecord made is not considered "lawfully" made for purposes of sections 109, 110, or other provisions of the title.

Clause (3) provides that nothing in section 108 is intended to limit the reproduction and distribution by lending of a limited number of copies and excerpts of an audiovisual news program. This exemption is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

The clause was first added to the revision bill in 1974 by the adoption of an amendment proposed by Senator Baker. It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network news casts for limited distribution to scholars and researchers for use in research purposes. As such, it is an adjunct to the American Television and Radio Archive estabished in Section 113 of the Act [2 U.S.C. 170] which will be the principal repository for television broadcast material, including news broadcasts, the inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause.

Clause (4), in addition to asserting that nothing contained in section 108 "affects the right of fair use as provided by section 107", also provides that the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections: For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.

It is the intent of this legislation that a subsequent unlawful use by a user of a copy or phonorecord of a work lawfully made by a library, shall not make the library liable for such improper use.

**Multiple Copies and Systematic Reproduction.** Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions." However, this section does not authorize the related or concerted reproduction of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.

With respect to material described in subsection (d)—articles or other contributions to periodicals or collections, and small parts of other copyrighted works—subsection (g)(2) provides that the exemptions of section 108 do not apply if the library or archive engages in "systematic reproduction or distribution of single or multiple copies or phonorecords." This provision in S. 22 provoked a storm of controversy, centering around the extent to which the restrictions on "systematic" activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange of photocopies. After thorough consideration, the Committee amended section 108(g)(2) to add the following proviso:

> *Provided*, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

In addition, the Committee added a new subsection (i) to section 108 [this section], requiring the Register of Copyrights, five years from the effective date of the new Act and at five-year intervals thereafter, to report to Congress upon "the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users," and to make appropriate legislative or other recommendations. As noted in connection with section 107, the Committee also amended section 504(c) in a way that would insulate librarians from unwarranted liability for copyright infringement; this amendment is discussed below.

The key phrases in the Committee's amendment of section 108(g)(2) are "aggregate quantities" and "substitute for a subscription to or purchase of" a work. To be implemented effectively in practice, these provisions will require the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.

The National Commission on New Technological Uses of Copyrighted Works (CONTU) offered to provide good offices in helping to develop these guidelines. This offer was accepted and, although the final text of guidelines has not yet been achieved, the Committee has reason to hope that, within the next month, some agreement can be reached on an initial set of guidelines covering practices under section 108(g)(2).

**Works Excluded.** Subsection (h) provides that the rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than "an audiovisual work dealing with news." The latter term is intended as the equivalent in meaning of the phrase "audiovisual news program" in section 108(f)(3). The exclusions under subsection (h) do not apply to archival reproduction under subsection (b), to replacement of damaged or lost copies or phonorecords under subsection (c), or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

Although subsection (h) generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in section 108 impairs the

applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.

REFERENCES IN TEXT

The effective date of this Act, referred to in subsec. (i), is Jan. 1, 1978.

CROSS REFERENCES

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted works, see section 106 of this title.

Importation of copies or phonorecords by organization operated for scholarly, educational, or religious purposes and not for private gain, see section 602 of this title.

Reproduction and distribution of regularly scheduled newscasts or on-the-spot coverage of news event for research purposes by Librarian of Congress, see section 170 of Title 2, The Congress.

Use of material in conjunction with computers and similar information systems, see section 117 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 117, 501, 602 of this title; title 2 section 170.

### § 109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2548.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Effect on Further Disposition of Copy or Phonorecord.** Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law [section 27 of former title 17], the copyright owner's exclusive right of public distribution would have no effect upon anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.

Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Under section 202 however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent.

To come within the scope of section 109(a), a copy or phonorecord must have been "lawfully made under this title," though not necessarily with the copyright owner's authorization. For example, any resale of an illegally "pirated" phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not.

**Effect on Display of Copy.** Subsection (b) of section 109 deals with the scope of the copyright owner's exclusive right to control the public display of a particular "copy" of a work (including the original or prototype copy in which the work was first fixed). Assuming, for example, that a painter has sold the only copy of an original work of art without restrictions, would it be possible for him to restrain the new owner from displaying it publicly in galleries, shop windows, on a projector, or on television?

Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner. As in cases arising under section 109(a), this does not mean that contractual restrictions on display between a buyer and seller would be unenforceable as a matter of contract law.

The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the viewers are "present at the place where the copy is located."

On the other hand, section 109(b) takes account of the potentialities of the new communications media, notably television, cable and optical transmission devices, and information storage and retrieval devices, for replacing printed copies with visual images. First of all, the public display of an image of a copyrighted work would not be exempted from copyright control if the copy from which the image was derived were outside the presence of the viewers. In other words, the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.

Moreover, the exemption would extend only to public displays that are made "either directly or by the projection of no more than one image at a time." Thus, even where the copy and the viewers are located at the same place, the simultaneous projection of multiple images of the work would not be exempted. For example, where each person in a lecture hall is supplied with a separate viewing apparatus, the copyright owner's permission would generally be required in order to project an image of a work on each individual screen at the same time.

The committee's intention is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected. Unless it constitutes a fair

use under section 107, or unless one of the special provisions of section 110 or 111 is applicable, projection of more than one image at a time, or transmission of an image to the public over television or other communication channels, would be an infringement for the same reasons that reproduction in copies would be. The concept of "the place where the copy is located" is generally intended to refer to a situation in which the viewers are present in the same physical surroundings as the copy, even though they cannot see the copy directly.

**Effect of Mere Possession of Copy or Phonorecord.** Subsection (c) of section 109 qualifies the privileges specified in subsections (a) and (b) by making clear that they do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it. Acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privilege to dispose of the copy under section 109(a) or to display it publicly under section 109(b). To cite a familiar example, a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission.

**Burden of Proof in Infringement Actions.** During the course of its deliberations on this section, the Committee's attention was directed to a recent court decision holding that the plaintiff in an infringement action had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired under section 27 of the present law [section 27 of former title 17]. *American International Pictures, Inc.* v. *Foreman*, 400 F.Supp. 928 (S.D.Alabama 1975). The Committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary. The defendant in such actions clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of providing this evidence to the court. It is the intent of the Committee, therefore, that in an action to determine whether a defendant is entitled to the privilege established by section 109(a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant.

CROSS REFERENCES

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted works, see section 106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 117, 501 of this title.

### § 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if—

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for—

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if—

(A) there is no direct or indirect admission charge; or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance under the following conditions;

(i) the notice shall be in writing and signed by the copyright owner or such owner's duly authorized agent; and

(ii) the notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for the objection; and

(iii) the notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation;

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horti-

cultural fair or exhibition conducted by such body or organization; the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization, under doctrines of vicarious liability or related infringement, for a performance by a concessionnaire, business establishment, or other person at such fair or exhibition, but shall not excuse any such person from liability for the performance;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring;

(8) performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of: (i) a governmental body; or (ii) a noncommercial educational broadcast station (as defined in section 397 of title 47); or (iii) a radio subcarrier authorization (as defined in 47 CFR 73.293–73.295 and 73.593–73.595); or (iv) a cable system (as defined in section 111(f)).

(9) performance on a single occasion of a dramatic literary work published at least ten years before the date of the performance, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap, if the performance is made without any purpose of direct or indirect commercial advantage and its transmission is made through the facilities of a radio subcarrier authorization referred to in clause (8)(iii), *Provided*, That the provisions of this clause shall not be applicable to more than one performance of the same work by the same performers or under the auspices of the same organization.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2549.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Clauses (1) through (4) of section 110 deal with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation. Clauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place.

**Face-to-Face Teaching Activities.** Clause (1) of section 110 is generally intended to set out the conditions under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

There appears to be no need for a statutory definition of "face-to-face" teaching activities to clarify the scope of the provision. "Face-to-face teaching activities" under clause (1) embrace instructional performances and displays that are not "transmitted." The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

*Works Affected.*—Since there is no limitation on the types of works covered by the exemption, teachers or students would be free to perform or display anything in class as long as the other conditions of the clause are met. They could read aloud from copyrighted text material, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

*Instructors or Pupils.*—To come within clause (1), the performance or display must be "by instructors or pupils," thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term "instructors" would be broad enough to include guest lecturers if their instructional activities remain confined to classroom situations. In general, the term "pupils" refers to the enrolled members of a class.

*Nonprofit Educational Institution.*—Clause (1) makes clear that it applies only to the teaching activities "of a nonprofit educational institution," thus excluding from the exemption performances or displays in profit-making institutions such as dance studios and language schools.

*Classroom or Similar Place.*—The teaching activities exempted by the clause must take place "in a classroom or similar place devoted to instruction." For example, performances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The "similar place" referred to in clause (1) is a place which is "devoted to instruction" in the same way a classroom is; common examples would include a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself, if it is actually used as a classroom for systematic instructional activities.

*Motion Pictures and Other Audiovisual Works.*—The final provision of clause (1) deals with the special

problem of performances from unlawfully-made copies of motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was "not lawfully made under this title" and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully-made copies, even if the copies were acquired from someone who had stolen or converted them, or if the performances were in violation of an agreement. However, though the performance would be exempt under section 110(1) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3), or against the person responsible for the performance, for breach of contract.

*Projection Devices.*—As long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process.

**Instructional Broadcasting.** *Works Affected.*—The exemption for instructional broadcasting provided by section 110(2) would apply only to "performance of a nondramatic literary or musical work or display of a work." Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture. Since, as already explained, audiovisual works such as filmstrips are equated with motion pictures, their sequential showing would be regarded as a performance rather than a display and would not be exempt under section 110(2). The clause is not intended to limit in any way the copyright owner's exclusive right to make dramatizations, adaptations, or other derivative works under section 106(2). Thus, for example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form.

*Systematic Instructional Activities.*—Under section 110(2) a transmission must meet three specified conditions in order to be exempted from copyright liability. The first of these, as provided by subclause (A), is that the performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The concept of "systematic instructional activities" is intended as the general equivalent of "curriculums," but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work. A transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the governmental body or institution. The use of commercial facilities, such as those of a cable service, to transmit the performance or display, would not affect the exemption as long as the actual performance or display was for nonprofit purposes.

*Content of Transmission.*—Subclause (B) requires that the performance or display be directly related and of material assistance to the teaching content of the transmission.

*Intended Recipients.*—Subclause (C) requires that the transmission is made primarily for:

(i) Reception in classrooms or similar places normally devoted to instruction, or

(ii) Reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) Reception by officers or employees of governmental bodies as a part of their official duties or employment.

In all three cases, the instructional transmission need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made "primarily" for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the "primary" purpose of a program would include its subject matter, content, and the time of its transmission.

Paragraph (i) of subclause (C) generally covers what are known as "in-school" broadcasts, whether open- or closed-circuit. The reference to "classrooms or similar places" here is intended to have the same meaning as that of the phrase as used in section 110(1). The exemption in paragraph (ii) is intended to exempt transmissions providing systematic instruction to individuals who cannot be reached in classrooms because of "their disabilities or other special circumstances." Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2)(C)(ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.

The third exemption in subclause (C) is intended to permit the use of copyrighted material, in accordance with the other conditions of section 110(2), in the course of instructional transmissions for Government personnel who are receiving training "as a part of their official duties or employment."

**Religious Services.** The exemption in clause (3) of section 110 covers performances of a nondramatic literary or musical work, and also performances "of dramatico-musical works of a religious nature"; in addition, it extends to displays of works of all kinds. The exemption applies where the performance or display is "in the course of services at a place of worship or other religious assembly." The scope of the clause does not cover the sequential showing of motion pictures and other audiovisual works.

The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law [sections 1 and 104 of former title 17], applies to dramatico-musical works "of a religious nature." The purpose here is to exempt certain performances of sacred music that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place "in the course of [religious] services."

To be exempted under section 110(3) a performance or display must be "in the course of services," thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes. Some performances of these kinds could be covered by the exemption in section 110(4), discussed next. Since the performance or display must also occur "at a place of worship or other religious assembly," the exemption would not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship. On the other hand, as long as

services are being conducted before a religious gathering, the exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.

**Certain Other Nonprofit Performances.** In addition to the educational and religious exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present "for profit" limitation.

*Scope of Exemption.*—The exemption in clause (4) applies to the same general activities and subject matter as those covered by the "for profit" limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a "transmission to the public." Unlike the clauses (1) through (3) and (5) of section 110, but like clauses (6) through (8), clause (4) applies only to performing rights in certain works, and does not affect the exclusive right to display a work in public.

*No Profit Motive.*—In addition to the other conditions specified by the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

*No Payment for Performance.*—An important condition for this exemption is that the performance be given "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly "for the performance," are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word "salary" be added to the phrase referring to the "payment of any fee or other compensation."

*Admission Charge.*—Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one of two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain."

Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left "after deducting the reasonable costs of producing the performance" are used solely for bona fide educational, religious, or charitable purposes. In cases arising under this second condition and as provided in subclause (B), where there is an admission charge, the copyright owner is given an opportunity to decide whether and under what conditions the copyrighted work should be performed; otherwise, owners could be compelled to make involuntary donations to the fund-raising activities of causes to which they are opposed. The subclause would thus permit copyright owners to prevent public performances of their works under section 110(4)(B) by serving notice of objection, with the reasons therefor, at least seven days in advance.

**Mere Reception in Public.** Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.

With respect to section 110(5), the conference substitute conforms to the language in the Senate bill. It is the intent of the conferees that a small commercial establishment of the type involved in *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151 (1975), [95 S.Ct. 2040, 45 L.Ed.2d 84], which merely augmented a home-type receiver and which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service, would be exempt. However, where the public communication was by means of something other than a home-type receiving apparatus, or where the establishment actually makes a further transmission to the public, the exemption would not apply.

On June 17, 1975, the Supreme Court handed down a decision in *Twentieth Century Music Corp.* v. *Aiken*, 95 S.Ct. 2040 [422 U.S. 151, 45 L.Ed.2d 84], that raised fundamental questions about the proper interpretation of section 110(5). The defendant, owner and operator of a fast-service food shop in downtown Pittsburgh, had "a radio with outlets to four speakers in the ceiling," which he apparently turned on and left on throughout the business day. Lacking any performing license, he was sued for copyright infringement by two ASCAP members. He lost in the District Court, won a reversal in the Third Circuit Court of Appeals, and finally prevailed, by a margin of 7–2, in the Supreme Court.

The *Aiken* decision is based squarely on the two Supreme Court decisions dealing with cable television. In *Fortnightly Corp.* v. *United Artists*, 392 U.S. 390 [88 S.Ct. 2084, 20 L.Ed.2d 1176, rehearing denied 89 S.Ct. 65, 393 U.S. 902, 21 L.Ed.2d 190], and again in *Teleprompter Corp.* v. *CBS*, 415 U.S. 394 [94 S.Ct. 1129, 39 L.Ed.2d 415], the Supreme Court has held that a CATV operator was not "performing" within the meaning of the 1909 statute, when it picked up broadcast signals off the air and retransmitted them to subscribers by cable. The *Aiken* decision extends this interpretation of the scope of the 1909 statute's right of "public performance for profit" to a situation outside the CATV context and, without expressly overruling the decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931) [51 S.Ct. 410, 75 L.Ed. 971], effectively deprives it of much meaning under the present law. For more than forty years the *Jewell-LaSalle* rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its guests and patrons. As reinterpreted by the *Aiken* decision, the rule of *Jewell-LaSalle* applies only if the broadcast being retransmitted was itself unlicensed.

The majority of the Supreme Court in the Aiken case based its decision on a narrow construction of the word "perform" in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of "perform" in section 101

[section 101 of this title]. The Committee has adopted the language of section 110(5) [cl. (5) of this section], with an amendment expressly denying the exemption in situations where the "performance or display is further transmitted beyond the place where the receiving apparatus is located"; in doing so, it accepts the traditional, pre-*Aiken*, interpretation of the *Jewell-LaSalle* decision, under which public communication by means other than a home receiving set, or further transmission of a broadcast to the public, is considered an infringing act.

Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

**Agricultural Fairs.** The Committee also amended clause (6) of section 110 of S. 22 as adopted by the Senate. As amended, the provision would exempt "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization." The exemption extends only to the governmental body or nonprofit organization sponsoring the fair; the amendment makes clear that, while such a body or organization cannot itself be held vicariously liable for infringements by concessionaires at the fair, the concessionaires themselves enjoy no exemption under the clause.

**Retail Sale of Phonorecords.** Clause (7) provides that the performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, is not an infringement of copyright. This exemption applies only if the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

**Transmission to Handicapped Audiences.** The new clause (8) of subsection 110, which had been added to S. 22 by the Senate Judiciary Committee when it reported the bill on November 20, 1975, and had been adopted by the Senate on February 19, 1976, was substantially amended by the Committee. Under the amendment, the exemption would apply only to performances of "nondramatic literary works" by means of "a transmission specifically designed for and primarily directed to" one or the other of two defined classes of handicapped persons: (1) "blind or other handicapped persons who are unable to read normal printed material as a result of their handicap" or (2) "deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission." Moreover, the exemption would be applicable only if the performance is "without any purpose of direct or indirect commercial advantage," and if the transmission takes place through government facilities or through the facilities of a noncommercial educational broadcast station, a radio subcarrier authorization (SCA), or a cable system.

CROSS REFERENCES

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted works, see section 106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 111, 112, 117, 118, 501 of this title.

### § 111. Limitations on exclusive rights: Secondary transmissions

#### (a) Certain secondary transmissions exempted

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

#### (b) Secondary transmission of primary transmission to controlled group

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the primary transmission is not made for reception by

the public at large but is controlled and limited to reception by particular members of the public: *Provided, however,* That such secondary transmission is not actionable as an act of infringement if—

(1) the primary transmission is made by a broadcast station licensed by the Federal Communications Commission; and

(2) the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission; and

(3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

**(c) Secondary transmissions by cable systems**

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided,* That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further,* That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

**(d) Compulsory license for secondary transmissions by cable systems**

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when

the Tribunal has been constituted), shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraphs (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programing consist-

ing exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

**(e) Nonsimultaneous secondary transmissions by cable systems**

(1) Notwithstanding those provisions of the second paragraph of subsection (f) relating to nonsimultaneous secondary transmissions by a cable system, any such transmissions are actionable as an act of infringement under section 501, and are fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, unless—

(A) the program on the videotape is transmitted no more than one time to the cable system's subscribers; and

(B) the copyrighted program, episode, or motion picture videotape, including the commercials contained within such program, episode, or picture, is transmitted without deletion or editing; and

(C) an owner or officer of the cable system (i) prevents the duplication of the videotape while in the possession of the system, (ii) prevents unauthorized duplication while in the possession of the facility making the videotape for the system if the system owns or controls the facility, or takes reasonable precautions to prevent such duplication if it does not own or control the facility, (iii) takes adequate precautions to prevent duplication while the tape is being transported, and (iv) subject to clause (2), erases or destroys, or causes the erasure or destruction of, the videotape; and

(D) within forty-five days after the end of each calendar quarter, an owner or officer of the cable system executes an affidavit attesting (i) to the steps and precautions taken to prevent duplication of the videotape, and (ii) subject to clause (2), to the erasure or destruction of all videotapes made or used during such quarter; and

(E) such owner or officer places or causes each such affidavit, and affidavits received pursuant to clause (2)(C), to be placed in a file, open to public inspection, at such system's main office in the community where the transmission is made or in the nearest community where such system maintains an office; and

(F) the nonsimultaneous transmission is one that the cable system would be authorized to transmit under the rules, regulations, and authorizations of the Federal Communications Commission in effect at the time of the nonsimultaneous transmission if the transmission had been made simultaneously, except that this subclause shall not apply to inadvertent or accidental transmissions.

(2) If a cable system transfers to any person a videotape of a program nonsimultaneously transmitted by it, such transfer is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, except that, pursuant to a written, nonprofit contract providing for the equitable sharing of the costs of such videotape and its transfer, a videotape nonsimultaneously transmitted by it, in accordance with clause (1), may be transferred by one cable system in Alaska to another system in Alaska, by one cable system in Hawaii permitted to make such nonsimultaneous transmissions to another such cable system in Hawaii, or by one cable system in Guam, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands, to another cable system in any of those three territories, if—

(A) each such contract is available for public inspection in the offices of the cable systems involved, and a copy of such contract is filed, within thirty days after such contract is entered into, with the Copyright Office (which Office shall make each such contract available for public inspection); and

(B) the cable system to which the videotape is transferred complies with clause (1)(A), (B), (C)(i), (iii), and (iv), and (D) through (F); and

(C) such system provides a copy of the affidavit required to be made in accordance with clause (1)(D) to each cable system making a previous nonsimultaneous transmission of the same videotape.

(3) This subsection shall not be construed to supersede the exclusivity protection provisions of any existing agreement, or any such agreement hereafter entered into, between a cable system and a television broadcast station in the area in which the cable system is located, or a network with which such station is affiliated.

(4) As used in this subsection, the term "videotape", and each of its variant forms, means the reproduction of the images and sounds of a program or programs broadcast by a television broadcast station licensed by the Federal Communications Commission, regardless of the nature of the material objects, such as tapes or films, in which the reproduction is embodied.

**(f) Definitions**

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

The "local service area of a primary transmitter", in the case of a television broadcast station, comprises the area in which such station is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on April 15, 1976, or in the case of a television broadcast station licensed by an appropriate governmental authority of Canada or Mexico, the area in which it would be entitled to insist upon its signal being retransmitted if it were a television broadcast station subject to such rules, regulations, and authorizations. The "local service area of a primary transmitter", in the case of a radio broadcast station, comprises the primary service area of such station, pursuant to the rules and regulations of the Federal Communications Commission.

A "distant signal equivalent" is the value assigned to the secondary transmission of any nonnetwork television programing carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programing. It is computed by assigning a value of one to each independent station and a value of one-quarter to each network station and noncommercial educational station for the nonnetwork programing so carried pursuant to the rules, regulations, and authorizations of the Federal Communications Commission. The foregoing values for independent, network, and noncommercial educational stations are subject, however, to the following exceptions and limitations. Where the rules and regulations of the Federal Communications Commission require a cable system to omit the further transmission of a particular program and such rules and regulations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, or where such rules and regulations in effect on the date of enactment of this Act permit a cable system, at its election, to effect such deletion and substitution of a nonlive program or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no value shall be assigned for the substituted or additional program; where the rules, regulations, or authorizations of the Federal Communications Commission in effect on the date of enactment of this Act permit a cable system, at its election, to omit the further transmission of a particular program and such rules, regulations, or authorizations also permit the substitution of another program embodying a performance or display of a work in place of the omitted transmission, the value assigned for the substituted or additional program shall be, in the case of a live program, the value of one full distant signal equivalent multiplied by a fraction that has as its numerator the number of days in the year in which such substitution occurs and as its denominator the number of days in the year. In the case of a station carried pursuant to the late-night or specialty programing rules of the Federal Communications Commission, or a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry, the values for independent, network, and noncommercial educational stations set forth above, as the case may be, shall be multiplied by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

A "network station" is a television broadcast station that is owned or operated by, or

affiliated with, one or more of the television networks in the United States providing nationwide transmissions, and that transmits a substantial part of the programing supplied by such networks for a substantial part of that station's typical broadcast day.

An "independent station" is a commercial television broadcast station other than a network station.

A "noncommercial educational station" is a television station that is a noncommercial educational broadcast station as defined in section 397 of title 47.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2550.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Introduction and General Summary.** The complex and economically important problem of "secondary transmissions" is considered in section 111. For the most part, the section is directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works. However, other forms of secondary transmissions are also considered, including apartment house and hotel systems, wired instructional systems, common carriers, nonprofit "boosters" and translators, and secondary transmissions of primary transmissions to controlled groups.

Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging about six dollars. A large number of these systems provide automated programing. A growing number of CATV systems also originate programs, such as movies and sports, and charge additional fees for this service (pay-cable).

The number of cable systems has grown very rapidly since their introduction in 1950, and now total about 3,450 operating systems, servicing 7,700 communities. Systems currently in operation reach about 10.8 million homes. It is reported that the 1975 total subscriber revenues of the cable industry were approximately $770 million.

Pursuant to two decisions of the Supreme Court (*Fortnightly Corp.* v. *United Artist Television, Inc.*, 392 U.S. 390 (1968) [88 S.Ct. 2084, 20 L.Ed.2d 1176, rehearing denied 89 S.Ct. 65, 393 U.S. 902, 21 L.Ed.2d 190], and *Teleprompter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974)) [94 S.Ct. 1129, 39 L.Ed.2d 415], under the 1909 copyright law, the cable television industry has not been paying copyright royalties for its retransmission of over-the-air broadcast signals. Both decisions urged the Congress, however, to consider and determine the scope and extent of such liability in the pending revision bill.

The difficult problem of determining the copyright liability of cable television systems has been before the Congress since 1965. In 1967, this Committee sought to address and resolve the issues in H.R. 2512, an early version of the general revision bill (see H.R. Rep. No. 83, 90th Cong., 1st Sess.). However, largely because of the cable-copyright impasse, the bill died in the Senate.

The history of the attempts to find a solution to the problem since 1967 has been explored thoroughly in the voluminous hearings and testimony on the general revision bill, and has also been succinctly summarized by the Register of Copyrights in her Second Supplementary Report, Chapter V.

The Committee now has before it the Senate bill which contains a series of detailed and complex provisions which attempt to resolve the question of the copyright liability of cable television systems. After extensive consideration of the Senate bill, the arguments made during and after the hearings, and of the issues involved, this Committee has also concluded that there is no simple answer to the cable-copyright controversy. In particular, any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

The compulsory license is conditioned, however, on certain requirements and limitations. These include compliance with reporting requirements, payment of the royalty fees established in the bill, a ban on the substitution or deletion of commercial advertising, and geographic limits on the compulsory license for copyrighted programs broadcast by Canadian or Mexican stations. Failure to comply with these requirements and limitations subjects a cable system to a suit for copyright infringement and the remedies provided under the bill for such actions.

In setting a royalty fee schedule for the compulsory license, the Committee determined that the initial schedule should be established in the bill. It recognized, however, that adjustments to the schedule would be required from time to time. Accordingly, the Copyright Royalty Commission, established in chapter 8 [§ 801 et seq. of this title], is empowered to make the adjustments in the initial rates, at specified times, based on standards and conditions set forth in the bill.

In setting an initial fee schedule, the Senate bill based the royalty fee on a sliding scale related to the gross receipts of a cable system for providing the basic retransmission service and rejected a statutory scheme that would distinguish between "local" and "distant" signals. The Committee determined, however, that there was no evidence that the retransmission of "local" broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programing, including network programing which is broadcast in "distant" markets, does not injure the copyright

owner. The copyright owner contracts with the network on the basis of his programing reaching all markets served by the network and is compensated accordingly.

By contrast, their retransmission of distant non-network programing by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing.

In implementing this conclusion, the Committee generally followed a proposal submitted by the cable and motion picture industries, the two industries most directly affected by the establishment of copyright royalties for cable television systems. Under the proposal, the royalty fee is determined by a two step computation. First, a value called a "distant signal equivalent" is assigned to all "distant" signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network, and educational stations because of the different amounts of viewing of non-network programing carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent. These values are then combined and a scale of percentages is applied to the cumulative total.

The Committee also considered various proposals to exempt certain categories of cable systems from royalty payments altogether. The Committee determined that the approach of the Senate bill to require some payment by every cable system is sound, but established separate fee schedules for cable systems whose gross receipts for the basic retransmission service do not exceed either $80,000 or $160,000 semiannually. It is the Committee's view that the fee schedules adopted for these systems are now appropriate, based on their relative size and the services performed.

All the royalty payments required under the bill are paid on a semiannual basis to the Register of Copyrights. Each year they are distributed by the Copyright Royalty Commission to those copyright owners who may validly claim that their works were the subject of distant non-network retransmissions by cable systems.

Based on current estimates supplied to the Committee, the total royalty fees paid under the initial schedule established in the bill should approximate $8.7 million. Compared with the present number of cable television subscribers, calculated at 10.8 million, copyright payments under the bill would therefore approximate 81 cents per subscriber per year. The Committee believes that such payments are modest and will not retard the orderly development of the cable television industry or the service it provides to its subscribers.

**Analysis of Provisions.** Throughout section 111, the operative terms are "primary transmission" and "secondary transmission." These terms are defined in subsection (f) entirely in relation to each other. In any particular case, the "primary" transmitter is the one whose signals are being picked up and further transmitted by a "secondary" transmitter which in turn, is someone engaged in "the further transmitting of a primary transmission simultaneously with the primary transmission." With one exception provided in subsection (f) and limited by subsection (e), the section does not cover or permit a cable system, or indeed any person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public. The one exception involves cable systems located outside the continental United States, but not including cable systems in Puerto Rico, or, with limited exceptions, Hawaii. These systems are permitted to record and retransmit programs under the compulsory license, subject to the restrictive conditions of subsection (e), because off-the-air signals are generally not available in the offshore areas.

**General Exemptions.** Certain secondary transmissions are given a general exemption under clause (1) of section 111(a). The first of these applies to secondary transmissions consisting "entirely of the relaying, by the management of a hotel, apartment house, or similar establishment" of a transmission to the private lodgings of guests or residents and provided "no direct charge is made to see or hear the secondary transmission."

The exemption would not apply if the secondary transmission consists of anything other than the mere relay of ordinary broadcasts. The cutting out of advertising, the running in of new commercials, or any other change in the signal relayed would subject the secondary transmitter to full liability. Moreover, the term "private lodgings" is limited to rooms used as living quarters or for private parties, and does not include dining rooms, meeting halls, theatres, ballrooms, or similar places that are outside of a normal circle of a family and its social acquaintances. No special exception is needed to make clear that the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement.

**Secondary Transmissions of Instructional Broadcasts.** Clause (2) of section 111(a) is intended to make clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a "primary transmission" or a "secondary transmission."

**Carriers.** The general exemption under section 111 extends to secondary transmitters that act solely as passive carriers. Under clause (3), a carrier is exempt if it "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission." For this purpose its activities must "consist solely of providing wires, cables, or other communications channels for the use of others."

Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.

**Secondary Transmissions of Primary Transmissions to Controlled Group.** Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display is actionable as an act of infringement if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcasts to theatres, pay television (STV) or pay-cable.

The Senate bill contains a provision, however, stating that the secondary transmission does not constitute an act of infringement if the carriage of the signals comprising the secondary transmission is required under the rules and regulations of the FCC. The exclusive purpose of this provision is to exempt a cable system from copyright liability if the FCC should require cable systems to carry to their subscribers a "scrambled" pay signal of a subscription television station.

The Committee is concerned, however, that the Senate bill is not clearly limited to the situation where a cable system is required by the FCC to carry a "scrambled" pay television signal. The Committee be-

lieves that the provision should not include any authority or permission to "unscramble" the signal. Further, the Senate bill does not make clear that the exception would not apply if the primary transmission is made by a cable system or cable system network transmitting its own originated program, e.g., pay-cable. For these reasons, the subsection was amended to provide that the exception would only apply if (1) the primary transmission to a controlled group is made by a broadcast station licensed by the FCC; (2) the carriage of the signal is required by FCC rules and regulations; and (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

**Compulsory License.** Section 111(c) establishes the compulsory license for cable systems generally. It provides that, subject to the provisions of clauses (2), (3) and (4), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the FCC or by an appropriate governmental authority of Canada or Mexico is subject to compulsory licensing upon compliance with the provisions of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules and regulations of the FCC. The compulsory license applies, therefore, to the carriage of over-the-air broadcast signals and is inapplicable to the secondary transmission of any nonbroadcast primary transmission such as a program originated by a cable system or a cable network. The latter would be subject to full copyright liability under other sections of the legislation.

**Limitations on the Compulsory License.** Sections 111(c)(2), (3) and (4) establish limitations on the scope of the compulsory license, and provide that failure to comply with these limitations subjects a cable system to a suit for infringement and all the remedies provided in the legislation for such actions.

Section 111(c)(2) provides that the "willful or repeated" carriage of signals not permissible under the rules and regulations of the FCC subjects a cable system to full copyright liability. The words "willful or repeated" are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts ("Repeated" does not mean merely "more than once," of course; rather, it denotes a degree of aggravated negligence which borders on willfulness. Such a condition would not exist in the case of an innocent mistake as to what signals or programs may properly be carried under the FCC's complicated rules). Section 111(c)(2) also provides that a cable system is subject to full copyright liability where the cable system has not recorded the notice, deposited the statement of account, or paid the royalty fee required by subsection (d). The Committee does not intend, however, that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer. The Committee expects that in most instances of this type the parties would be able to work out the problem without resort to the courts.

**Commercial Substitution.** Section 111(c)(3) provides that a cable system is fully subject to the remedies provided in this legislation for copyright infringement if the cable system willfully alters, through changes, deletions, or additions, the content of a particular program or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of the program. In the Committee's view, any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system or changes in the program content of the primary transmission, significantly alters the basic nature of the cable retransmission service, and makes its function similar to that of a broadcaster. Further, the placement of substitute advertising in a program by a cable system on a "local" signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach. On a "distant" signal, the placement of substitute advertising harms the local broadcaster in the distant market because the cable system is then competing for local advertising dollars without having comparable program costs. The Committee has therefore attempted broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages. Included in the prohibition are commercial messages and station announcements not only during, but also immediately before or after the program, so as to insure a continuous ban on commercial substitution from one program to another. In one situation, however, the Committee has permitted such substitution when the commercials are inserted by those engaged in television commercial advertising market research. This exception is limited to those situations where the research company has obtained the consent of the advertiser who purchased the original commercial advertisement, the television station whose signal is retransmitted, and the cable system, and provided further that no income is derived from the sale of such commercial time.

**Canadian and Mexican Signals.** Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

In the Committee's view, the authorization by the FCC to a cable system to carry a foreign signal does not resolve the copyright question of the royalty payment that should be made for copyrighted programs originating in the foreign country. The latter raises important international questions of the protection to be accorded foreign copyrighted works in the United States. While the Committee has established a general compulsory licensing scheme for the retransmission of copyrighted works of U.S. nationals, a broad compulsory license scheme for all foreign works does not appear warranted or justified. Thus, for example, if in the future the signal of a British, French, or Japanese station were retransmitted in the United States by a cable system, full copyright liability would apply.

With respect to Canadian and Mexican signals, the Committee found that a special situation exists regarding the carriage of these signals by U.S. cable systems on the northern and southern borders, respectively. The Committee determined, therefore, that with respect to Canadian signals the compulsory license would apply in an area located 150 miles from the U.S.-Canadian border, or south from the border to the 42nd parallel of latitude, whichever distance is greater. Thus the cities of Detroit, Pittsburgh, Cleveland, Green Bay and Seattle would be included within the compulsory license area, while cities such as New York, Philadelphia, Chicago, and San Francisco would be located outside the area.

With respect to Mexican signals, the Commission determined that the compulsory license would apply only in the area in which such signals may be received by a U.S. cable system by means of direct interception of a free space radio wave. Thus, full copyright liability would apply if a cable system were required to use any equipment or device other than a receiving antenna to bring the signal to the community of the cable system.

Further, to take account of those cable systems that are presently carrying or are specifically authorized to carry Canadian or Mexican signals, pursuant to FCC rules and regulations, and whether or not within the zones established, the Committee determined to grant a compulsory license for the carriage of those specific signals on those cable systems as in effect on April 15, 1976.

The Committee wishes to stress that cable systems operating within these zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside the zones, however, full copyright liability would apply as would all the remedies of the legislation for any act of infringement.

**Requirements for a Compulsory License.** The compulsory license provided for in section 111(c) is contingent upon fulfillment of the requirements set forth in section 111(d). Subsection (d)(1) directs that at least one month before the commencement of operations, or within 180 days after the enactment of this act [Oct. 19, 1976], whichever is later, a cable system must record in the Copyright Office a notice, including a statement giving the identity and address of the person who owns or operates the secondary transmission service or who has power to exercise primary control over it, together with the name and location of the primary transmitter whose signals are regularly carried by the cable system. Signals "regularly carried" by the system mean those signals which the Federal Communications Commission has specifically authorized the cable system to carry, and which are actually carried by the system on a regular basis. It is also required that whenever the ownership or control or regular signal carriage complement of the system changes, the cable system must within 30 days record any such changes in the Copyright Office. Cable systems must also record such further information as the Register of Copyrights shall prescribe by regulation.

Subsection (d)(2) directs cable systems whose secondary transmissions have been subject to compulsory licensing under subsection (c) to deposit with the Register of Copyrights a semi-annual statement of account. The dates for filing such statements of account and the six-month period which they are to cover are to be determined by the Register of Copyrights after consultation with the Copyright Royalty Commission. In addition to other such information that the Register may prescribe by regulation, the statements of account are to specify the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were carried by the system, the total number of subscribers to the system, and the gross amounts paid to the system for the basic service of providing secondary transmissions. If any non-network television programming was retransmitted by the cable system beyond the local service area of the primary transmitter, pursuant to the rules of the Federal Communications Commission, which under certain circumstances permit the substitution or addition of television signals not regularly carried, the cable system must deposit a special statement of account listing the times, dates, stations and programs involved in such substituted or added carriage.

**Copyright Royalty Payments.** Subsection (d)(2)(B), (C) and (D) require cable systems to deposit royalty fee payments for the period covered by the statements of account. These payments are to be computed on the basis of specified percentages of the gross receipts from cable subscribers during the period covered by the statement. For purposes of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services or installation charges, are not included in gross receipts.

Subsection (d)(2)(B) provides that, except in the case of a cable system that comes within the gross receipts limitations of subclauses (C) and (D), the royalty fee is computed in the following manner:

Every cable system pays .675 of 1 percent of its gross receipts for the privilege of retransmitting distant non-network programming, such amount to be applied against the fee, if any, payable under the computation for "distant signal equivalents." The latter are determined by adding together the values assigned to the actual number of distant television stations carried by a cable system. The purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non-network programming. It is not a payment for the retransmission of purely "local" signals, as is evident from the provision that it applies to and is deductible from the fee payable for any "distant signal equivalents."

The remaining provisions of subclause (B) establish the following rates for "distant signal equivalents:"

The rate from zero to one distant signal equivalent is .675 of 1 percent of gross subscriber revenues. An additional .425 of 1 percent of gross subscriber revenues is to be paid for each of the second, third and fourth distant signal equivalents that are carried. A further payment of .2 of 1 percent of gross subscriber revenues is to be made for each distant signal equivalent after the fourth. Any fraction of a distant signal equivalent is to be computed at its fractional value and where a cable system is located partly within and partly without the local service area of a primary transmitter, the gross receipts subject to the percentage payment are limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter.

Pursuant to the foregoing formula, copyright payments as a percentage of gross receipts increase as the number of distant television signals carried by a cable system increases. Because many smaller cable systems carry a large number of distant signals, especially those located in areas where over-the-air television service is sparse, and because smaller cable systems may be less able to shoulder the burden of copyright payments than larger systems, the Committee decided to give special consideration to cable systems with semi-annual gross subscriber receipts of less than $160,000 ($320,000 annually). The royalty fee schedules for cable systems in this category are specified in subclauses (C) and (D).

In lieu of the payments required in subclause (B), systems earning less than $80,000, semi-annually, are to pay a royalty fee of .5 of 1 percent of gross receipts. Gross receipts under this provision are computed, however, by subtracting from actual gross receipts collected during the payment period the amount by which $80,000 exceeds such actual gross receipts. Thus, if the actual gross receipts of the cable system for the period covered are $60,000, the fee is determined by subtracting $20,000 (the amount by which $80,000 exceeds actual gross receipts) from $60,000 and applying .5 of 1 percent to the $40,000 result. However, gross receipts in no case are to be reduced to less than $3,000.

Under subclause (D), cable systems with semi-annual gross subscriber receipts of between $80,000 and $160,000 are to pay royalty fees of .5 of 1 percent of such actual gross receipts up to $80,000, and 1 percent of any actual gross receipts in excess of $80,000. The royalty fee payments under both subclauses (C) and (D) are to be determined without regard to the number of distant signal equivalents, if any, carried by the subject cable systems.

**Copyright Royalty Distribution.** Section 111(d)(3) provides that the royalty fees paid by cable systems under the compulsory license shall be received by the Register of Copyrights and, after deducting the reasonable costs incurred by the Copyright Office, deposited in the Treasury of the United States. The fees are distributed subsequently, pursuant to the determination of the Copyright Royalty Commission under chapter 8 [§ 801 et seq. of this title].

The copyright owners entitled to participate in the distribution of the royalty fees paid by cable systems under the compulsory license are specified in section 111(d)(4). Consistent with the Committee's view that copyright royalty fees should be made only for the re-

transmission of distant non-network programming, the claimants are limited to (1) copyright owners whose works were included in a secondary transmission made by a cable system of a distant non-network television program; (2) any copyright owner whose work is included in a secondary transmission identified in a special statement of account deposited under section 111(d)(2)(A); and (3) any copyright owner whose work was included in distant non-network programming consisting exclusively of aural signals. Thus, no royalty fees may be claimed or distributed to copyright owners for the retransmission of either "local" or "network" programs.

The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants.

Should disputes arise, however, between the different classes of copyright claimants, the Committee believes that the Copyright Royalty Commission should consider that with respect to the copyright owners of "live" programs identified by the special statement of account deposited under Section 111(d)(2)(A), a special payment is provided in Section 111(f).

Section 111(d)(5) sets forth the procedure for the distribution of the royalty fees paid by cable systems. During the month of July of each year, every person claiming to be entitled to compulsory license fees must file a claim with the Copyright Royalty Commission, in accordance with such provisions as the Commission shall establish. In particular, the Commission may establish the relevant period covered by such claims after giving adequate time for copyright owners to review and consider the statements of account filed by cable systems. Notwithstanding any provisions of the antitrust laws, the claimants may agree among themselves as to the division and distribution of such fees. After the first day of August of each year, the Copyright Royalty Commission shall determine whether a controversy exists concerning the distribution of royalty fees. If no controversy exists, the Commission, after deducting its reasonable administrative costs, shall distribute the fees to the copyright owners entitled or their agents. If the Commission finds the existence of a controversy, it shall, pursuant to the provisions of chapter 8 [§ 801 et seq. of this title], conduct a proceeding to determine the distribution of royalty fees.

**Off-Shore Taping by Cable Systems.** Section 111(e) establishes the conditions and limitation upon which certain cable systems located outside the continental United States, and specified in subsection (f), may make tapes of copyrighted programs and retransmit the taped programs to their subscribers upon payment of the compulsory license fee. These conditions and limitations include compliance with detailed transmission, record keeping, and other requirements. Their purpose is to control carefully the use of any tapes made pursuant to the limited recording and retransmission authority established in subsection (f), and to insure that the limited objective of assimilating offshore cable systems to systems within the United States for purposes of the compulsory license is not exceeded. Any secondary transmission by a cable system entitled to the benefits of the taping authorization that does not comply with the requirements of section 111(e) is an act of infringement and is fully subject to all the remedies provided in the legislation for such actions.

**Definitions.** Section 111(f) contains a series of definitions. These definitions are found in subsection (f) rather than in section 101 because of their particular application to secondary transmissions by cable systems.

*Primary and Secondary Transmissions.* The definitions of "primary transmission" and "secondary transmission" have been discussed above. The definition of "secondary transmission" also contains a provision permitting the nonsimultaneous retransmission of a primary transmission if by a cable system "not located in whole or in part within the boundary of the forty-eight contiguous states, Hawaii or Puerto Rico." Under a proviso, however, a cable system in Hawaii may make a nonsimultaneous retransmission of a primary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations or authorizations of the FCC.

The effect of this definition is to permit certain cable systems in offshore areas, but not including cable systems in the offshore area of Puerto Rico and to a limited extent only in Hawaii, to tape programs and retransmit them to subscribers under the compulsory license. Puerto Rico was excluded based upon a communication the Committee received from the Governor of Puerto Rico stating that the particular television broadcasting problems which the definition seeks to solve for cable systems in other noncontiguous areas do not exist in Puerto Rico. He therefore requested that Puerto Rico be excluded from the scope of the definition. All cable systems covered by the definition are subject to the conditions and limitations for nonsimultaneous transmissions established in section 111(e).

*Cable System.* The definition of a "cable system" establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service. A closed circuit wire system that only originates programs and does not carry television broadcast signals would not come within the definition. Further, the definition provides that, in determining the applicable royalty fee and system classification under subsection (d)(2) (B), (C), or (D) cable systems in contiguous communities under common ownership or control or operating from one headend are considered as one system.

*Local Service Area of a Primary Transmitter.* The definition of "local service area of a primary transmitter" establishes the difference between "local" and "distant" signals and therefore the line between signals which are subject to payment under the compulsory license and those that are not. It provides that the local service area of a television broadcast station is the area in which the station is entitled to insist upon its signal being retransmitted by a cable system pursuant to FCC rules and regulations. Under FCC rules and regulations this so called "must carry" area is defined based on the market size and position of cable systems in 47 C.F.R. §§ 76.57, 76.59, 76.61 and 76.63. The definition is limited, however, to the FCC rules in effect on April 15, 1976. The purpose of this limitation is to insure that any subsequent rule amendments by the FCC that either increase or decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute.

The "local service area of a primary transmitter" of a Canadian or Mexican television station is defined as the area in which such station would be entitled to insist upon its signals being retransmitted if it were a television broadcast station subject to FCC rules and regulations. Since the FCC does not permit a television station licensed in a foreign country to assert a claim to carriage by a U.S. cable system, the local service area of such foreign station is considered to be the same area as if it were a U.S. station.

The local service area for a radio broadcast station is defined to mean "the primary service area of such station pursuant to the rules and regulations of the Fed-

eral Communications Commission." The term "primary service area" is defined precisely by the FCC with regard to AM stations in Section 73.11(a) of the FCC's rules. In the case of FM stations, "primary service area" is regarded by the FCC as the area included within the field strength contours specified in Section 73.311 of its rules.

*Distant Signal Equivalent.* The definition of a "distant signal equivalent" is central to the computation of the royalty fees payable under the compulsory license. It is the value assigned to the secondary transmission of any non-network television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one (1) to each distant independent station and a value of one-quarter (¼) to each distant network station and distant noncommercial educational station carried by a cable system, pursuant to the rules and regulations of the FCC. Thus, a cable system carrying two distant independent stations, two distant network stations and one distant noncommercial educational station would have a total of 2.75 distant signal equivalents.

The values assigned to independent, network and noncommercial educational stations are subject, however, to certain exceptions and limitations. Two of these relate to the mandatory and discretionary program deletion and substitution rules of the FCC. Where the FCC rules require a cable system to omit certain programs (e.g., the syndicated program exclusivity rules) and also permit the substitution of another program in place of the omitted program, no additional value is assigned for the substituted or additional program. Further, where the FCC rules on the date of enactment of this legislation permit a cable system, at its discretion, to make such deletions or substitutions or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no additional value is assigned for the substituted or additional programs. However, the latter discretionary exception is subject to a condition that if the substituted or additional program is a "live" program (e.g., a sports event), then an additional value is assigned to the carriage of the distant signal computed as a fraction of one distant signal equivalent. The fraction is determined by assigning to the numerator the number of days in the year on which the "live" substitution occurs, and by assigning to the denominator the number of days in the year. Further, the discretionary exception is limited to those FCC rules in effect on the date of enactment of this legislation [Oct. 19, 1976]. If subsequent FCC rule amendments or individual authorizations enlarge the discretionary ability of cable systems to delete and substitute programs, such deletions and substitutions would be counted at the full value assigned the particular type of station provided above.

Two further exceptions pertain to the late-night or specialty programming rules of the FCC or to a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry. In this event, the values for independent, network and noncommercial, educational stations set forth above, as the case may be, are determined by multiplying each by a fraction which is equal to the ratio of the broadcast hours of such station carried by the cable system to the total broadcast hours of the station.

*Network Station.* A "network station" is defined as a television broadcast station that is owned or operated by, or affiliated with, one or more of the U.S. television networks providing nationwide transmissions and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day. To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition. Further, a station affiliated with a regional network would not qualify, since a regional network would not provide nationwide transmissions. However, a station affiliated with a network providing nationwide transmissions that also occasionally carries regional programs would qualify as a "network station," if the station transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day.

*Independent Station.* An "independent station" is defined as a commercial television broadcast station other than a network station. Any commercial station that does not fall within the definition of "network station" is classified as an "independent station."

*Noncommercial Educational Station.* A "noncommercial educational station" is defined as a television station that is a noncommercial educational broadcast station within the meaning of section 397 of title 47 [47 U.S.C. 397].

### References in Text

"After the enactment of this Act" and "date of enactment of this Act", referred to in subsecs. (d)(1) and (f), respectively, mean Oct. 19, 1976.

The antitrust laws, referred to in subsec. (d)(5)(A), are classified generally to chapter 1 (§ 1 et seq.) of Title 15, Commerce and Trade.

### Cross References

Action for infringement of copyright, see section 501 of this title.

Effective date of final determinations concerning proceedings involving distribution of royalty fees, see section 809 of this title.

Exclusive rights in copyrighted works, see section 106 of this title.

Institution and conclusion of proceedings—

Distribution of royalty fees, see section 804 of this title.

Owner or users of copyrighted work whose royalty rates are specified by this section, see section 804 of this title.

Remedies for alteration of programing by cable systems, see section 510 of this title.

Royalty rate and fees—

Determination concerning adjustment of copyright royalty rate, see section 801 of this title.

Distribution of copyright royalty fees, see section 801 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 106, 110, 117, 501, 510, 801, 804, 809 of this title.

## § 112. Limitations on exclusive rights: Ephemeral recordings

(a) Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than one copy or phonorecord of a particular transmission program embodying the performance or display, if—

(1) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

(2) the copy or phonorecord is used solely for the transmitting organization's own trans-

missions within its local service area, or for purposes of archival preservation or security; and

(3) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display, if—

(1) no further copies or phonorecords are reproduced from the copies or phonorecords made under this clause; and

(2) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are destroyed within seven years from the date the transmission program was first transmitted to the public.

(c) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization to make for distribution no more than one copy or phonorecord, for each transmitting organization specified in clause (2) of this subsection, of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work, if—

(1) there is no direct or indirect charge for making or distributing any such copies or phonorecords; and

(2) none of such copies or phonorecords is used for any performance other than a single transmission to the public by a transmitting organization entitled to transmit to the public a performance of the work under a license or transfer of the copyright; and

(3) except for one copy or phonorecord that may be preserved exclusively for archival purposes, the copies or phonorecords are all destroyed within one year from the date the transmission program was first transmitted to the public.

(d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than ten copies or phonorecords embodying the performance, or to permit the use of any such copy or phonorecord by any governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), if—

(1) any such copy or phonorecord is retained and used solely by the organization that made it, or by a governmental body or nonprofit organization entitled to transmit a performance of a work under section 110(8), and no further copies or phonorecords are reproduced from it; and

(2) any such copy or phonorecord is used solely for transmissions authorized under section 110(8), or for purposes of archival preservation or security; and

(3) the governmental body or nonprofit organization permitting any use of any such copy or phonorecord by any governmental body or nonprofit organization under this subsection does not make any charge for such use.

(e) The transmission program embodied in a copy or phonorecord made under this section is not subject to protection as a derivative work under this title except with the express consent of the owners of copyright in the preexisting works employed in the program.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2558.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

**Recordings for Licensed Transmissions.** Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own area; after 6 months it must be destroyed or preserved solely for archival purposes.

*Organizations Covered.*—The ephemeral recording privilege is given by subsection (a) to "a transmitting organization entitled to transmit to the public a performance or display of a work." Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, public radio and television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right to make the transmission "under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

Some concern has been expressed by authors and publishers lest the term "organization" be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be "retained and used solely by the transmitting organization that made it," and must

be used solely for that organization's own transmissions within its own area. Thus, an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by another transmitter. Likewise, this subsection does not apply to those nonsimultaneous transmissions by cable systems not located within a boundary of the forty-eight contiguous States that are granted a compulsory license under section 111.

*Scope of the Privilege.*—Subsection (a) permits the transmitting organization to make "no more than one copy or phonorecord of a particular transmission program embodying the performance or display." A "transmission program" is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular "transmission program" containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other "transmission programs."

Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an "ephemeral recording" becomes fully actionable as an infringement. The first requires that the copy or phonorecord be "retained and used solely by the transmitting organization that made it," and that "no further copies or phonorecords are reproduced from it." This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or of allowing them to duplicate their own ephemeral recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral recording made by means of facilities other than its own, although it would not be permissible for a person or organization other than a transmitting organization to make a recording on its own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while it is being transmitted and are intended for deferred transmission or preservation.

Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be "used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security". The term "local service area" is defined in section 111(f).

Clause (3) of section 112(a) provides that, unless preserved exclusively for archival purposes, the copy or phonorecord of a transmission program must be destroyed within six months from the date the transmission program was first transmitted to the public.

**Recordings for Instructional Transmissions.** Section 112(b) represents a response to the arguments of instructional broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make not more than thirty copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission.

*Organizations Covered.*—The privilege of making ephemeral recordings under section 112(b) extends to a "governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Aside from phonorecords of copyrighted sound recordings, the ephemeral recordings made by an instructional broadcaster under subsection (b) must embody a performance or display that meets all of the qualifications for exemption under section 110(2). Copies or phonorecords made for educational broadcasts of a general cultural nature, or for transmission as part of an information storage and retrieval system, would not be exempted from copyright protection under section 112(b).

*Motion Pictures and Other Audiovisual Works.*—Since the performance exemption provided by section 110(2) applies only to nondramatic literary and musical works, there was no need to exclude motion pictures and other audiovisual works explicitly from the scope of section 112(b). Another point stressed by the producers of educational films in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market. They argued that it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters, without paying any copyright royalties, thereby directly injuring the market of producers of audiovisual works who now pay substantial fees to authors for the same uses. These arguments are persuasive and justify the placing of reasonable limits on the recording privilege.

*Scope of the Privilege.*—Under subsection (b) an instructional broadcaster may make "no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display." No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else.

On the other hand, if the nonprofit organization does nothing directly or indirectly to authorize, induce, or encourage others to duplicate additional copies or phonorecords of an ephemeral recording in excess of the limit of thirty, it would not be held responsible as participating in the infringement in such a case, and the unauthorized copies would not be counted against the organization's total of thirty.

Unlike ephemeral recordings made under subsection (a), exchanges of recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer the other 29 copies to other instructional broadcasters for use in the same way.

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. Because of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to seven years from the date the transmission program was first transmitted to the public.

*Religious Broadcasts.*—Section 112(c) provides that it is not an infringement of copyright for certain nonprofit organizations to make no more than one copy for each transmitting organization of a broadcast program embodying a performance of a nondramatic musical work of a religious nature or of a sound recording of such a musical work. In order for this exception to be applicable there must be no charge for the distribution of the copies, none of the copies may be used for any performance other than a single transmission by an organization possessing a license to transmit a copyrighted work, and, other than for one copy that may be preserved for archival purposes, the remaining copies must be destroyed within one year from the date the program was first transmitted to the public.

Despite objections by music copyright owners, the Committee found this exemption to be justified by the special circumstances under which many religious programs are broadcast. These programs are produced on tape or disk for distribution by mail of one copy only to each broadcast station carrying the program. None of the programs are prepared for profit, and the pro-

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gram producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses, so the copyright owners receive compensation. Following the performance, the tape is returned or the disk destroyed. It seems likely that, as has been alleged, to require a second payment for the mechanical reproduction under these circumstances would simply have the effect of driving some of the copyrighted music off the air.

**Ephemeral Recordings for Transmissions to Handicapped Audiences.** As a counterpart to its amendment of section 110(8), the Committee adopted a new provision, subsection (d) of section 112, to provide an ephemeral recording exemption in the case of transmissions to the blind and deaf. New subsection would permit the making of one recording of a performance exempted under section 110(8), and its retention for an unlimited period. It would not permit the making of further reproductions or their exchange with other organizations.

**Copyright Status of Ephemeral Recordings.** A program reproduced in an ephemeral recording made under section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. In section 112(e) it is provided that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

CROSS REFERENCES

Action for infringement of copyright, see section 501 of this title.

Exclusive rights in copyrighted work, see section 106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 117, 501 of this title.

### § 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(a) Subject to the provisions of subsections (b) and (c) of this section, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2560.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 113 deals with the extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in *Mazer* v. *Stein*, 347 U.S. 201 (1954) [74 S.Ct. 460, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1096], and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The terms "pictorial, graphic, and sculptural works" and "useful article" are defined in section 101, and these definitions are discussed above in connection with section 102.

The broad language of section 106(1) and of subsection (a) of section 113 rasies questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that portrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that "copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself," and recommended specifically that "the distinctions drawn in this area by existing court decisions" not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding "any statutory formulation that would express the distinction satisfactorily." Section 113(b) reflects the Register's conclusion that "the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such."

Section 113(c) provides that it would not be an infringement of copyright, where a copyright work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in the news reports.

In conformity with its deletion from the bill of Title II, relating to the protection of ornamental designs of useful articles, the Committee has deleted subsections (b), (c), and (d) of section 113 of S. 22 as adopted by the Senate, since they are no longer relevant.

CROSS REFERENCES

Exclusive rights in copyrighted work, see section 106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 117, 501 of this title.

### § 114. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4).

(b) The exclusive right of the owner of copyright in a sound recording under clause (1) of section 106 is limited to the right to duplicate the sound recording in the form of phonorecords, or of copies of motion pictures and other audiovisual works, that directly or indirectly recapture the actual sounds fixed in the recording. The exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds

fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality. The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. The exclusive rights of the owner of copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(g)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4).

(d) On January 3, 1978, the Register of Copyrights, after consulting with representatives of owners of copyrighted materials, representatives of the broadcasting, recording, motion picture, entertainment industries, and arts organizations, representatives of organized labor and performers of copyrighted materials, shall submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2560.)

HISTORICAL AND REVISION NOTES

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Subsection (a) of Section 114 specified that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the copyrighted sound recording, and to distribute copies or phonorecords of the sound recording to the public. Subsection (a) states explicitly that the owner's rights "do not include any right of performance under section 106(4)." The Committee considered at length the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyrights to submit to Congress, on January 3, 1978, "a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners * * * any performance rights" in copyrighted sound recordings. Under the new subsection, the report "should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any."

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

Under section 114, the exclusive right of owner of copyright in a sound recording to prepare derivative works based on the copyrighted sound recording is recognized. However, in view of the expressed intention not to give exclusive rights against imitative or simulated performances and recordings, the Committee adopted an amendment to make clear the scope of rights under section 106(2) in this context. Section 114(b) provides that the "exlusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."

Another amendment deals with the use of copyrighted sound recordings "included in educational television and radio programs * * * distributed or transmitted by or through public broadcasting entities." This use of recordings is permissible without authorization from the owner of copyright in the sound recording, as long as "copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public."

During the 1975 hearings, the Register of Copyrights expressed some concern that an invaluable segment of this country's musical heritage—in the form of sound recordings—had become inaccessible to musicologists and to others for scholarly purposes. Several of the major recording companies have responded to the Register's concern by granting blanket licenses to the Library of Congress to permit it to make single copy duplications of sound recordings maintained in the Library's archives for research purposes. Moreover, steps are being taken to determine the feasibility of additional licensing arrangements as a means of satisfying the needs of key regional music libraries across the country. The Register has agreed to report to Congress if further legislative consideration should be undertaken.

Section 114(c) states explicitly that nothing in the provisions of section 114 [this section] should be construed to "limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)." This principle is already implicit in the bill, but it is restated to avoid the danger of confusion between rights in a sound recording and rights in the musical composition or other work embodied in the recording.

CROSS REFERENCES

Ephemeral recordings, see section 112 of this title.

Exclusive rights in copyrighted work, see section 106 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 112, 117, 501 of this title.

### § 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

**(a) Availability and scope of compulsory license**

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

**(b) Notice of intention to obtain compulsory license**

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) Failure to serve or file the notice required by clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

**(c) Royalty payable under compulsory license**

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.

(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.

(3) Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

(4) If the copyright owner does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2561.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The provisions of section 1(e) and 101(e) of the present law [sections 1(e) and 101(e) of former title 17], establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue of the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by another person, if that person notifies the copyright owner and pays a specified royalty.

The fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be. The arguments for and against retention of the compulsory license are outlined at pages 66-67 of this Committee's 1967 report (H. Rept. No. 83, 90th Cong., 1st Sess.). The Committee's conclusion on this point remains the same as in 1967: "that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music," but "that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low."

**Availability and Scope of Compulsory License.** Subsection (a) of section 115 deals with three doubtful questions under the present law: (1) the nature of the original recording that will make the work available to others for recording under a compulsory license; (2) the nature of the sound recording that can be made under a compulsory license; and (3) the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright owner's right to make an "arrangement" or other derivative work. The first two of these questions are answered in clause (1) of section 115(a), and the third is the subject of clause (2).

The present law, though not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public. The first sentence of section 115(a)(1) would change the basis for compulsory licensing to authorized public distribution of phonorecords (including disks and audio tapes but not the sound tracks or other sound records accompanying a motion picture or other audiovisual work). Under the clause, a compulsory license would be available to anyone as soon as "phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner."

The second sentence of clause (1), which has been the subject of some debate, provides that "a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use." This provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings without the express consent of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturers of phonorecords that are intended primarily for commercial use, including not only broadcasters and jukebox operators but also background music services.

The final sentence of clause (1) provides that a person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another, unless the sound recording being duplicated was itself fixed lawfully and the making of phonorecords duplicated from it was authorized by the owner of copyright in the sound recording (or, if the recording was fixed before February 15, 1972, by the voluntary or compulsory licensee of the music used in the recording). The basic intent of this sentence is to make clear that a person is not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3d, 5th, 9th and 10th Circuits in the following cases: *Duchess Music Corp.* v. *Stern*, 458 F.2d 1305 (9th Cir.), cert. denied, 409 U.S. 847 (1972) [93 S.Ct. 52, 34 L.Ed.2d 88]; *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F.2d 285, aff'd on rehearing en banc, 497 F.2d 292 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975) [95 S.Ct. 801, 42 L.Ed.2d 819]; *Jondora Music Publishing Co.* v. *Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir. 1974, as amended 1975), cert. denied, 421 U.S. 1012 (1975) [95 S.Ct. 2417, 44 L.Ed.2d 680]; and *Fame Publishing Co.* v. *Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir.), cert. denied, 423 U.S. 841 (1975) [96 S.Ct. 73, 46 L.Ed.2d 61].

Under this provision, it would be possible to obtain a compulsory license for the use of copyrighted music under section 115 if the owner of the sound recording being duplicated authorizes its duplication. This does not, however, in any way require the owner of the original sound recording to grant a license to duplicate the original sound recording. It is not intended that copyright protection for sound recordings be circumscribed by requiring the owners of sound recordings to grant a compulsory license to unauthorized duplicators or others.

The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied. Clause (2) permits arrangements of a work "to the extent necessary to conform it to the style or manner of interpretation of the performance involved," so long as it does not "change the basic melody or fundamental character of the work." The provision also prohibits the compulsory licensee from claiming an independent copyright in his arrangement as a "derivative work" without the express consent of the copyright owner.

**Procedure for Obtaining Compulsory License.** Section 115(b)(1) requires anyone who wishes to take advantage of the compulsory licensing provisions to serve a "notice of intention to obtain a compulsory license," which is much like the "notice of intention to use" required by the present law. Under section 115 [this section], the notice must be served before any phonorecords are distributed, but service can take place "before or within 30 days after making" any phonorecords. The notice is to be served on the copyright owner, but if the owner is not identified in the Copyright Office records, "it shall be sufficient to file the notice of intention in the Copyright Office."

The Committee deleted clause (2) of section 115(b) of S. 22 as adopted by the Senate. The provision was a vestige of jukebox provisions in earlier bills, and its requirements no longer served any useful purpose.

Clause (2) [formerly clause (3)] of section 115(b) [cl. (2) of subsec. (b) of this section] provides that "failure to serve or file the notice required by clause (1) * * * forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506." The remedies provided in section 501 are those applicable to infringements generally.

**Royalty Payable Under Compulsory License.** *Identification of Copyright Owner.*—Under the present law a copyright owner is obliged to file a "notice of use" in the Copyright Office, stating that the initial recording of the copyrighted work has been made or licensed, in order to recover against an unauthorized record manufacturer. This requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal "notice of use" requirements and merely provides that, "to be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office." On the other hand, since proper identification is an important precondition of recovery, the bill further provides that "the owner is entitled to royalties for phonorecords manufactured and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed."

*Basis of Royalty.*—Under the present statute the specified royalty is payable "on each such part manufactured," regardless of how many "parts" (i.e., records) are sold. This basis for calculating the royalty has been revised in section 115(c)(2) to provide that "the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license." This basis is more compatible with the general practice in negotiated licenses today. It is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the record producer gains no economic benefit.

It is intended that the Register of Copyrights will prescribe regulations insuring that copyright owners will receive full and prompt payment for all phonorecords made and distributed. Section 115(c)(2) states that "a phonorecord is considered 'distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession." For this purpose, the concept of "distribution" comprises any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord (considered as a fungible unit), regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned, unless it is actually returned and the transaction cancelled. Neither involuntary relinquishment, as through theft or fire, nor the destruction of unwanted records, would constitute "distribution."

The term "made" is intended to be broader than "manufactured," and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords. The use of the phrase "made and distributed" establishes the basis upon which the royalty rate for compulsory licensing under section 115 is to be calculated, but it is in no way intended to weaken the liability of record pressers and other manufacturers and makers of phonorecords for copyright infringement where the compulsory licensing requirements have not been met. As under the present law, even if a presser, manufacturer, or other maker had no role in the distribution process, that person would be regarded as jointly and severally liable in a case where the court finds that infringement has taken place because of failure to comply with the provisions of section 115.

Under existing practices in the record industry, phonorecords are distributed to wholesalers and retailers with the privilege of returning unsold copies for credit or exchange. As a result, the number of recordings that have been "permanently" distributed will not usually be known until some time—six or seven months on the average—after the initial distribution. In recognition of this problem, it has become a well-established industry practice, under negotiated licenses, for record companies to maintain reasonable reserves of the mechanical royalties due the copyright owners, against which royalties on the returns can be offset. The Committee recognizes that this practice may be consistent with the statutory requirements for monthly compulsory license accounting reports, but recognizes the possibility that, without proper safeguards, the maintenance of such reserves could be manipulated to avoid making payments of the full amounts owing to copyright owners. Under these circumstances, the regulations prescribed by the Register of Copyrights should contain detailed provisions ensuring that the ultimate disposition of every phonorecord made under a compulsory license is accounted for, and that payment is made for every phonorecord "voluntarily and permanently" distributed. In particular, the Register should prescribe a point in time when, for accounting purposes under section 115, a phonorecord will be considered "permanently distributed," and should prescribe the situations in which a compulsory licensee is barred from maintaining reserves (e.g., situations in which the compulsory licensee has frequently failed to make payments in the past.)

*Rate of Royalty.*—A large preponderance of the extensive testimony presented to the Committee on section 115 was devoted to the question of the amount of the statutory royalty rate. An extensive review and analysis of the testimony and arguments received on this question appear in the 1974 Senate report (S. Rep. No. 94-473) at page 71-94.

While upon initial review it might be assumed that the rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty rate must be justified on the basis of existing economic conditions and not on the mere passage of 67 years. Following a thorough analysis of the problem, the Committee considers that an increase of the present two-cent royalty to a rate of 2¾ cents (or .6 of one cent per minute or fraction of playing time) is justified. This rate will be subject to review by the Copyright Royalty Commission, as provided by section 801, in 1980 and at 10-year intervals thereafter.

**Accounting and Payment of Royalties; Effect of Default.** Clause (3) of Section 115(c) provides that royalty payments are to be made on a monthly basis, in accordance with requirements that the Register of Copyrights shall prescribe by regulation. In order to increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations, compulsory licensees will also be required to make a detailed cumulative annual statement of account, certified by a Certified Public Accountant.

A source of criticism with respect to the compulsory licensing provisions of the present statute has been the rather ineffective sanctions against default by compulsory licensees. Clause (4) of section 115(c) corrects this defect by permitting the copyright owner to serve written notice on a defaulting licensee, and by providing for termination of the compulsory license if the default is not remedied within 30 days after notice is given. Termination under this clause "renders either the making or the distribution, or both, of all phonorecords for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506."

### Persons Operating Under Predecessor Compulsory Licensing Provisions

Section 106 of Pub. L. 94-553 provided that: "In any case where, before January 1, 1978, a person has lawfully made parts of instruments serving to reproduce mechanically a copyrighted work under the compulsory license provisions of section 1(e) of title 17 as it existed on December 31, 1977, such person may continue to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license under the terms of section 115 of title 17 as amended by the first section of this Act [this section]. However, such parts made on or after January 1, 1978, constitute phonorecords and are otherwise subject to the provisions of said section 115 [this section]."

### Cross References

Action for infringement of copyright, see section 501 of this title.

Determinations concerning adjustment of reasonable copyright royalty rates by Copyright Royalty Tribunal, see section 801 of this title.

Exclusive rights in copyrighted work, see section 106 of this title.

Fee for notice of intention to make phonorecords, see section 708 of this title.

Institution and conclusion of proceedings concerning adjustment of royalty rates as provided in this section, see section 804 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 106, 117, 501, 708, 801, 804 of this title.

## § 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

### (a) Limitation on exclusive right

In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless—

(A) such proprietor is the operator of the phonorecord player; or

(B) such proprietor refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate required by clause (1)(C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).

**(b) Recordation of coin-operated phonorecord player, affixation of certificate, and royalty payable under compulsory license**

(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:

(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available on that particular phonorecord player, the operator shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation, an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and deposit with the Register of Copyrights a royalty fee for the current calendar year of $8 for that particular phonorecord player. If such performances are made available on a particular phonorecord player for the first time after July 1 of any year, the royalty fee to be deposited for the remainder of that year shall be $4.

(B) Within twenty days of receipt of an application and a royalty fee pursuant to subclause (A), the Register of Copyrights shall issue to the applicant a certificate for the phonorecord player.

(C) On or before March 1 of the year in which the certificate prescribed by subclause (B) of this clause is issued, or within ten days after the date of issue of the certificate, the operator shall affix to the particular phonorecord player, in a position where it can be readily examined by the public, the certificate, issued by the Register of Copyrights under subclause (B), of the latest application made by such operator under subclause (A) of this clause with respect to that phonorecord player.

(2) Failure to file the application, to affix the certificate, or to pay the royalty required by clause (1) of this subsection renders the public performance actionable as an act of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506 and 509.

**(c) Distribution of royalties**

(1) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (b).

(2) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(3) After the first day of October of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1). If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(4) The fees to be distributed shall be divided as follows:

(A) to every copyright owner not affiliated with a performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.

(B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

(C) during the pendency of any proceeding under this section, the Copyright Royalty

Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(5) The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

**(d) Criminal penalties**

Any person who knowingly makes a false representation of a material fact in an application filed under clause (1)(A) of subsection (b), or who knowingly alters a certificate issued under clause (1)(B) of subsection (b) or knowingly affixes such a certificate to a phonorecord player other than the one it covers, shall be fined not more than $2,500.

**(e) Definitions**

As used in this section, the following terms and their variant forms mean the following:

(1) A "coin-operated phonorecord player" is a machine or device that—

(A) is employed solely for the performance of nondramatic musical works by means of phonorecords upon being activated by insertion of coins, currency, tokens, or other monetary units or their equivalent;

(B) is located in an establishment making no direct or indirect charge for admission;

(C) is accompanied by a list of the titles of all the musical works available for performance on it, which list is affixed to the phonorecord player or posted in the establishment in a prominent position where it can be readily examined by the public; and

(D) affords a choice of works available for performance and permits the choice to be made by the patrons of the establishment in which it is located.

(2) An "operator" is any person who, alone or jointly with others:

(A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance on a coin-operated phonorecord player.

(3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2562.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**General Background of the Problem.** No provision of the present law has attracted more heated denunciations and controversy than the so-called jukebox exemption of section 1(e) [section 1(e) of former title 17]. This paragraph, which has remained unchanged since its enactment in 1909, provides that—

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

This blanket exemption has been widely and vigorously condemned as an anachronistic "historical accident" and in terms such as "unconscionable," "indefensible," "totally unjustified," and "grossly discriminatory."

Efforts to repeal the clause have been going on for more than 50 years, and between 1947 and 1965 there had been some 25 days of congressional hearings devoted to the subject. The following summarizes the arguments against retaining the exemption:

1. The exemption for coin-operated machines was added to the 1909 act at the last moment, and its consequences were completely unforeseen. The coin-operated music player of today is not comparable to the player pianos and "penny parlor" mechanisms in use in 1909, and the unanticipated effect of the provision, creating a blanket exemption for a large industry that is based on use of copyrighted material, represents the "core defect" in the present law.

2. The exemption not only deprives copyright owners of revenue to which they are fairly entitled, but it also discriminates against all other commercial users who must pay in order to perform copyrighted music. Over the years the jukebox industry has become strong and prosperous by taking a free ride on the hits created and developed by authors and publishers. Jukebox operators, alone in the entertainment field, continue to use others' property for profit without payment.

3. The exemption also creates serious international problems. It is obviously unfair for U.S. composers to be paid when their songs are used in jukeboxes abroad, but also for foreign composers to be deprived of revenue from jukebox uses of their compositions in this country. The problem is particularly acute with respect to Canada. Jukebox royalties in foreign countries at the time of the hearings in the early 1960's averaged between $40 and $50 per machine annually, and are now higher.

4. It is difficult to find support for the argument that jukebox operators cannot afford to pay for use of the very property they must have in order to exist: copyrighted music. Revenues from jukebox performances may gross as much as $500 million annually of which the copyright owners receive nothing.

The following summarizes the principal arguments made by jukebox operators and manufacturers for retaining the present exemption:

1. The exemption in section 1(e) [section 1(e) of former title 17] was not an accident or anomaly, but a carefully conceived compromise. Congress in 1909 realized that the new royalties coming to copyright owners from mechanical sound reproductions of their works would be so substantial that in some cases fees for performances resulting from the use of mechanical reproductions would not be justified. Automatic phonographs were widely known and used in 1909.

2. The present law does not discriminate in favor of jukebox operators, but removal of the exemption would discriminate against them; jukebox performances are really forms of incidental entertainment like relays to hotel rooms or turning on a radio in a barber shop, and should be completely exempted like them. The industry buys some 50 million records per year which, under the present mechanical royalty of 2 cents per composition or 4 cents per record, means that jukebox operators are indirectly paying copyright owners over $2 million a year now and would be paying them more under any increased mechanical royalty in the bill. No one has shown why this is not ample. Moreover, jukeboxes use hit records rather than hit compositions, and the composition is usually not the most important factor in the success of a record; jukeboxes represent an effective plugging medium that promotes record sales and hence mechanical royalties.

3. The operation of coin-operated phonographs has been, for some time, a declining business, and a great many locations are now operating at a loss and are kept going only through profits from other coin-operated vending machines. Jukebox operators could not sustain licensing fees comparable to those paid in other countries.

**Conclusions Reached by the Committee.** The committee's basic conclusions can be summarized as follows:

1. The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the other enjoys any exemption.

2. Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commerical music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a period of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption.

3. The most appropriate basis for the compulsory license is a statutory per box fee, with a mechanism for periodic review and adjustment of the per box fee. Such a mechanism is afforded by the Copyright Royalty Commission.

4. The $8 per box annual compulsory license fee represents a compromise figure adopted in 1967 and, as a compromise, it is acceptable as the rate to be specified in section 116. The Committee was impressed by the testimony offered to show that shifting patterns in social activity and public taste, combined with increased manufacturing and servicing costs, have made many jukebox operations unprofitable.

**Limitations on Exclusive Right.** The compulsory licensing provisions in section 116 have been patterned after those in section 115, although there are differences. One difference occurs in the first subsection: section 116(a) not only provides "the operator of the coin-operated phonorecord player" with the opportunity of obtaining "a compulsory license to perform the work publicly on that phonorecord player," but also exempts entirely under certain conditions, "the proprietor of the establishment in which the public performance takes place." As provided by clause (1), the proprietor is not liable for infringement unless he is also "the operator of the phonorecord player" or unless he refuses or fails to disclose the operator's identity upon request.

As defined in section 116(e)(2) an "operator" is anyone who, alone or jointly: (1) owns a coin-operated phonorecord player; (2) "has the power to make the * * * player available for placement in an establishment for purposes of public performance"; and (3) "has the power to exercise primary control over the selection of the musical works made available for public performance" in the machine. Several different persons may be "operators" of the same coin-operated phonorecord player under this definition, but they would not include the "location owner" in the ordinary case where that person merely provides a place for the machine to be used.

In contrast to the present statute, which merely refers to a "coin-operated machine," section 116(e)(1) of the bill contains a detailed definition of "coin-operated phonorecord player." Under the definition a machine or device would be considered a "coin-operated phonorecord player" only if it meets all four specified conditions.

1. It must be used for no purpose other than the "performance of nondramatic musical works by means of phonorecords" and, in order to perform that function, it must be "activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent." The definition would thus exclude coin-operated radio and television sets, as well as devices similar to jukeboxes that perform musical motion pictures.

2. The establishment where the machine is located must make "no direct or indirect charge for admission." This requirement, which has its counterpart in section 1(e) of the present law [section 1(e) of former title 17], would exclude establishments making cover or minimum charges, and those "clubs" open to the public but requiring "membership fees" for admission.

3. The phonorecord player must be "accompanied by a list of the titles of all musical works available for performance on it," and the list must either be affixed to the machine itself or "posted in the establishment in a prominent position where it can be readily examined by the public." This condition would not be satisfied if the list is available only on request.

4. Finally, the machine must provide "a choice of works available for performance," and must allow "the choice to be made by the patrons of the establishment in which it is located." Thus, a machine that merely provides continuous music without affording any choice as to the specific composition to be played at a particular time, or a case where selections are made by someone other than patrons of the establishment, would be outside the scope of the definition.

Clause (2) of section 116(a) provides that a jukebox operator may obtain a compulsory license to perform copyrighted works by complying with the requirements of this section.

**Procedures.** Section 116(b)(1) sets forth the requirements that an operator must observe in order to obtain a compulsory license. The operator is required to file in the Copyright Office an application containing certain information and deposit with the Register of Copyrights an $8 royalty fee for each box. If performances on a particular box are made for the first time after July 1, the royalty fee for the remainder of the year shall be $4.00.

The Register of Copyrights is required to issue to the applicant a certificate for each machine and the operator is required to affix the certificate to the particular box. Failure to observe these requirements renders the public performance an act of infringement and fully liable for the statutory remedies.

**Distribution of Royalties.** Section 116(c) establishes the procedures for the distribution of the royalties paid by jukebox operators. During the month of January per-

sons who believe they are entitled to share in the royalties shall file a claim with the Copyright Royalty Commission. After the first of October the Commission shall determine whether there exists a controversy concerning the distribution of the royalty fees. If it determines that there is no controversy, it shall, after deducting its reasonable administrative costs, distribute the fees to the respective claimants. If it determines that there is a controversy concerning the distribution of royalty fees, it shall conduct a hearing to determine the distribution of royalty fees, as provided in Chapter 8 [§ 801 et seq. of this title].

Section 116(c)(3) enumerates the formula for the distribution of royalty fees. With respect to the fees allocated to owners of copyright in nondramatic musical works, every copyright owner not affiliated with a performing rights society shall receive a pro rata share and the balance shall be allocated to be distributed in pro rata shares. The Commission is authorized to withhold an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

Section 116(c)(4) directs the Copyright Royalty Commission to promulgate regulations whereby those persons who can reasonably be expected to have claims may, without expense or harrassment of jukebox operators or the proprietors of establishments in which jukeboxes are located, have access to such establishments and to the boxes, to obtain information that may be reasonably necessary to determine the proportion of the contribution of the musical works of each person to the earnings of the particular jukebox. A person who is denied access to the establishment and the jukeboxes may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the jukebox to which access has been denied, and the court may declare the compulsory license invalid. This clause is not intended to authorize the Commission to impose any record-keeping requirements upon jukebox operators, or to require the installation in jukeboxes of any metering devices for counting the play of particular recordings.

**Review of Royalty Rate.** The provisions of Chapter 8 of this legislation [§ 801 et seq. of this title] provides for the periodic review and adjustment of the statutory royalty rates, including those provided in section 116 [this section]. Jukebox operators have sought to have the jukebox royalty rate excluded from the review procedures of Chapter 8 [§ 801 et seq. of this title]. This committee has accepted the $8 jukebox royalty in the expectation that it would be subject to periodic review.

### References in Text

The antitrust laws, referred to in subsec. (c)(2), are classified generally to chapter 1 (§ 1 et seq.) of Title 15, Commerce and Trade.

### Cross References

Action for infringement of copyright, see section 501 of this title.

Determinations concerning adjustment of reasonable copyright royalty rates by Copyright Royalty Tribunal, see section 801 of this title.

Effective date of final determinations concerning proceedings involving distribution of royalty fees under this section, see section 809 of this title.

Exclusive rights in copyrighted work, see section 106 of this title.

Institution and conclusion of proceedings concerning adjustment of royalty rates as provided in this section, see section 804 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 106, 117, 501, 801, 804, 809 of this title.

## § 117. Scope of exclusive rights: Use in conjunction with computers and similar information systems

Notwithstanding the provisions of sections 106 through 116 and 118, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2565.)

### Historical and Revision Notes

#### House Report No. 94-1476

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information." The Commission on New Technological Uses is, among other things, now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is to preserve the status quo. It is intended neither to cut off any rights that may now exist, nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

The provision deals only with the exclusive rights of a copyright owner with respect to computer uses, that is, the bundle of rights specified for other types of uses in section 106 and qualified in sections 107 through 116 and 118. With respect to the copyrightability of computer programs, the ownership of copyrights in them, the term of protection, and the formal requirements of the remainder of the bill, the new statute would apply.

Under section 117, an action for infringement of a copyrighted work by means of a computer would necessarily be a federal action brought under the new title 17. The court, in deciding the scope of exclusive rights in the computer area, would first need to determine the applicable law, whether State statutory or common law or the Act of 1909. Having determined what law was applicable, its decision would depend upon its interpretation of what the law was on the point on the day before the effective date of the new statute.

### Cross References

Exclusive rights in copyrighted work, see section 106 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 106, 501 of this title.

## § 118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting

(a) The exclusive rights provided by section 106 shall, with respect to the works specified by subsection (b) and the activities specified by subsection (d), be subject to the conditions and limitations prescribed by this section.

(b) Not later than thirty days after the Copyright Royalty Tribunal has been constituted in accordance with section 802, the Chairman of the Tribunal shall cause notice to be published in the Federal Register of the initiation of proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by subsection (d) with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works during a period beginning as provided in clause (3) of this subsection and ending on December 31, 1982. Copyright owners and public broadcasting entities shall negotiate in good faith and cooperate fully with the Tribunal in an effort to reach reasonable and expeditious results. Notwithstanding any provision of the antitrust laws, any owners of copyright in works specified by this subsection and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive payments.

(1) Any owner of copyright in a work specified in this subsection or any public broadcasting entity may, within one hundred and twenty days after publication of the notice specified in this subsection, submit to the Copyright Royalty Tribunal proposed licenses covering such activities with respect to such works. The Copyright Royalty Tribunal shall proceed on the basis of the proposals submitted to it as well as any other relevant information. The Copyright Royalty Tribunal shall permit any interested party to submit information relevant to such proceedings.

(2) License agreements, voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the Tribunal: *Provided,* That copies of such agreements are filed in the Copyright Office within thirty days of execution in accordance with regulations that the Register of Copyrights shall prescribe.

(3) Within six months, but not earlier than one hundred and twenty days, from the date of publication of the notice specified in this subsection the Copyright Royalty Tribunal shall make a determination and publish in the Federal Register a schedule of rates and terms which, subject to clause (2) of this subsection, shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether or not such copyright owners and public broadcasting entities have submitted proposals to the Tribunal. In establishing such rates and terms the Copyright Royalty Tribunal may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in clause (2) of this subsection. The Copyright Royalty Tribunal shall also establish requirements by which copyright owners may receive reasonable notice of the use of their works under this section, and under which records of such use shall be kept by public broadcasting entities.

(4) With respect to the period beginning on the effective date of this title and ending on the date of publication of such rates and terms, this title shall not afford to owners of copyright or public broadcasting entities any greater or lesser rights with respect to the activities specified in subsection (d) as applied to works specified in this subsection than those afforded under the law in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) The initial procedure specified in subsection (b) shall be repeated and concluded between June 30 and December 31, 1982, and at five-year intervals thereafter, in accordance with regulations that the Copyright Royalty Tribunal shall prescribe.

(d) Subject to the transitional provisions of subsection (b)(4), and to the terms of any voluntary license agreements that have been negotiated as provided by subsection (b)(2), a public broadcasting entity may, upon compliance with the provisions of this section, including the rates and terms established by the Copyright Royalty Tribunal under subsection (b)(3), engage in the following activities with respect to published nondramatic musical works and published pictorial, graphic, and sculptural works:

(1) performance or display of a work by or in the course of a transmission made by a noncommercial educational broadcast station referred to in subsection (g); and

(2) production of a transmission program, reproduction of copies or phonorecords of such a transmission program, and distribution of such copies or phonorecords, where such production, reproduction, or distribution is made by a nonprofit institution or organization solely for the purpose of transmissions specified in clause (1); and

(3) the making of reproductions by a governmental body or a nonprofit institution of a transmission program simultaneously with its transmission as specified in clause (1), and the performance or display of the contents of such program under the conditions specified by clause (1) of section 110, but only if the reproductions are used for performances or displays for a period of no more than seven days from the date of the transmission specified in clause (1), and are destroyed before or at the end of such period. No person supplying, in accordance with clause (2), a reproduction of a transmission program to governmental bodies or nonprofit institutions under this clause shall have any liability as a result of failure of such body or institution to destroy such reproduction: *Provided,* That it shall have notified such body or institution of the requirement for such destruction pursuant to this clause: *And provided further,* That if such body or institution itself fails to destroy such reproduction it shall be deemed to have infringed.

(e) Except as expressly provided in this subsection, this section shall have no applicability to works other than those specified in subsection (b).

(1) Owners of copyright in nondramatic literary works and public broadcasting entities may, during the course of voluntary negotiations, agree among themselves, respectively, as to the terms and rates of royalty payments without liability under the antitrust laws. Any such terms and rates of royalty payments shall be effective upon filing in the Copyright Office, in accordance with regulations that the Register of Copyrights shall prescribe.

(2) On January 3, 1980, the Register of Copyrights, after consulting with authors and other owners of copyright in nondramatic literary works and their representatives, and with public broadcasting entities and their representatives, shall submit to the Congress a report setting forth the extent to which voluntary licensing arrangements have been reached with respect to the use of nondramatic literary works by such broadcast stations. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

(f) Nothing in this section shall be construed to permit, beyond the limits of fair use as provided by section 107, the unauthorized dramatization of a nondramatic musical work, the production of a transmission program drawn to any substantial extent from a published compilation of pictorial, graphic, or sculptural works, or the unauthorized use of any portion of an audiovisual work.

(g) As used in this section, the term "public broadcasting entity" means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in clause (2) of subsection (d).

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2565.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**General Background.** During its consideration of revision legislation in 1975, the Senate Judiciary Committee adopted an amendment offered by Senator Charles McC. Mathias. The amendment, now section 118 of the Senate bill (this section), grants to public broadcasting a compulsory license for use of nondramatic literary and musical works, as well as pictorial, graphic, and sculptural works, subject to payment of reasonable royalty fees to be set by the Copyright Royalty Tribunal established by that bill. The Mathias amendment requires that public broadcasters, at periodic intervals, file a notice with the Copyright Office containing information required by the Register of Copyrights and deposit a statement of account and the total royalty fees for the period covered by the statement. In July of each year all persons having a claim to such fees are to file their claims with the Register of Copyrights. If no controversy exists, the Register would distribute the royalties to the various copyright owners and their agents after deducting reasonable administrative costs; controversies are to be settled by the Tribunal.

On July 10, 1975, the House Subcommittee heard testimony on the Mathias amendment from representatives of public broadcasters, authors, publishers, and music performing rights societies. The public broadcasters pointed to Congressional concern for the development of their activities as evidenced by the Public Broadcasting Act [47 U.S.C. § 390 et seq.]. They urged that a compulsory license was essential to assure public broadcasting broad access to copyrighted materials at reasonable royalties and without administratively cumbersome and costly "clearance" problems that would impair the vitality of their operations. The opponents of the amendment argued that the nature of public broadcasting has changed significantly in the past decade, to the extent that it now competes with commercial broadcasting as a national entertainment and cultural medium. They asserted that the performing rights society arrangements under which copyrighted music is licensed for performance removed any problem in clearing music for broadcasting, and that voluntary agreements could adequately resolve the copyright problems feared by public broadcasters, at less expense and burden than the compulsory license, for synchronization and literary rights. The authors of literary works stressed that a compulsory licensing system would deny them the fundamental right to control the use of their works and protect their reputation in a major communications medium.

**General Policy Considerations.** The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967 [47 U.S.C. § 390 et seq.], that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas. However, the Committee did not feel that the broad compulsory license provided in the Senate bill is necessary to the continued successful operation of public broadcasting. In addition, the Committee believes that the system provided in the Senate bill for the deposit of royalty fees with the Copyright Office for distribution to claimants, and the resolution of disputes over such distribution by a statutory tribunal, can be replaced by payments directly between the parties, without the intervention of government machinery and its attendant administrative costs.

In general, the Committee amended the public broadcasting provisions of the Senate bill toward attainment of the objective clearly stated in the Report of the Senate Judiciary Committee, namely, that copyright owners and public broadcasters be encouraged to reach voluntary private agreements.

**Procedures.** Not later than thirty days following the publication by the President of the notice announcing the initial appointments to the Copyright Royalty Commission (specified in Chapter 8 [§ 801 et seq. of this title]), the Chairman of the Commission is to publish notice in the Federal Register of the initiation of proceedings to determine "reasonable terms and rates" for certain uses of published nondramatic musical works and published pictorial, graphic and sculptural works, during a period ending on December 31, 1982.

Copyright owners and public broadcasting entities that do not reach voluntary agreement are bound by the terms and rates established by the Commission, which are to be published in the Federal Register within six months of the notice of initiation of proceedings. During the period between the effective date of the Act [Jan. 1, 1978] and the publication of the rates and terms, the Committee has preserved the status quo by providing, in section 118(b)(4), that the Act does not afford to copyright owners or public broadcasting entities any greater or lesser rights with respect to the relevant uses of nondramatic musical works and pictorial, graphic, and sculptural works than those afforded under the law in effect on December 31, 1977.

License agreements that have been voluntarily negotiated supersede, as between the parties to the agreement, the terms and rates established by the Commission, provided that copies of the agreements are prop-

erly filed with the Copyright Office within 30 days of execution. Under clause (2) of section 118(b), the agreements may be negotiated "at any time"—whether before, during, or after determinations by the Commission.

Under section 118(c), the procedures for the Commission's establishing such rates and terms are to be repeated in the last half of 1982 and every five years thereafter.

**Establishment of Reasonable Terms and Rates.** In establishing reasonable terms and rates for public broadcasting use of the specified works, the Commission, under clause (b)(1) of section 118, is to consider proposals timely submitted to it, as well as "any other relevant information," including that put forward for its consideration "by any interested party."

The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting. It is intended that the Commission assure a fair return to copyright owners without unfairly burdening public broadcasters. Section 118(b)(3) provides that "the Commission may consider the rates for comparable circumstances under voluntary license agreements." The Commission is also expected to consider both the general public interest in encouraging the growth and development of public broadcasting, and the "promotion of science and the useful arts" through the encouragement of musical and artistic creation.

The Committee anticipates that the "terms" established by the Commission shall include provisions as to acceptable methods of payment of royalties by public broadcasting entities to copyright owners. For example, where the whereabouts of the copyright owner may not be readily known, the terms should specify the nature of the obligation of the public broadcasting entity to locate the owner, or to set aside or otherwise assure payment of appropriate royalties, should he or she appear and make a claim. Section 118(b)(3) requires the Commission "to establish requirements by which copyright owners may receive reasonable notice of the use of their works." The Committee intends that these requirements shall not impose undue hardships on public broadcasting entities and, in the above illustration, shall provide for the specific termination of any period during which the public broadcasting entity is required to set aside payments. It is expected that, in some cases, especially in the area of pictorial, graphic, and sculptural works, the whereabouts of the owners of copyright may not be known and they may never appear to claim payment of royalties.

The Commission is also to establish record keeping requirements for public broadcasting entities in order to facilitate the identification, calculation, allocation and payment of claims and royalties.

**Works Affected.** Under sections 118(b) and (e) of the Committee's amendment, the establishment of rates and terms by the Copyright Royalty Commission pertains only to the use of published nondramatic musical works, and published pictorial, graphic, and sculptural works. As under the Senate bill; rights in plays, operas, ballet and other stage presentations, motion pictures, and other audiovisual works are not affected.

Section 118(f) is intended to make clear that this section does not permit unauthorized use, beyond the limits of section 107, of individual frames from a filmstrip or any other portion of any audiovisual work. Additionally, the application of this section to pictorial, graphic, and sculptural works does not extend to the production of transmission programs drawn to any substantial extent from a compilation of such works.

The Committee also concluded that the performance of nondramatic literary works should not be subject to Commission determination. It was particularly concerned that a compulsory license for literary works would result in loss of control by authors over the use of their work in violation of basic principles of artistic and creative freedom. It is recognized that copyright not only provides compensation to authors, but also protection as to how and where their works are used. The Committee was assured by representatives of authors and publishers that licensing arrangements for readings from their books, poems, and other works on public broadcasting programs for reasonable compensation and under reasonable safeguards for authors' rights could be worked out in private negotiation. The Committee strongly urges the parties to work toward mutually acceptable licenses; to facilitate their negotiations and aid in the possible establishment of clearance mechanisms and rates, the Committee's amendment provides the parties, in section 118(e)(1), with an appropriately limited exemption from the antitrust laws [15 U.S.C. § 1 et seq.].

The Committee has also provided, in paragraph (2) of clause (e), that on January 3, 1980, the Register of Copyrights, after consultation with the interested parties, shall submit a report to Congress on the extent to which voluntary licensing arrangements have been reached with respect to public broadcast use of nondramatic literary works, and present legislative or other recommendations, if warranted.

The use of copyrighted sound recordings in educational television and radio programs distributed by or through public broadcasting entities is governed by section 114 and is discussed in connection with that section.

**Activities Affected.** Section 118(d) specifies the activities which may be engaged in by public broadcasting entities under terms and rates established by the Commission. These include the performance or display of published nondramatic musical works, and of published pictorial, graphic, and sculptural works, in the course of transmissions by noncommercial educational broadcast stations; and the production, reproduction, and distribution of transmission programs including such works by nonprofit organizations for the purpose of such transmissions. It is the intent of the Committee that "interconnection" activities serving as a technical adjunct to such transmissions, such as the use of satellites or microwave equipment, be included within the specified activities.

Paragraph (3) of clause (d) also includes the reproduction, simultaneously with transmission, of public broadcasting programs by governmental bodies or nonprofit institutions, and the peformance or display of the contents of the reproduction under the conditions of section 110(1). However, the reproduction so made must be destroyed at the end of seven days from the transmission.

This limited provision for unauthorized simultaneous or off-the-air reproduction is limited to nondramatic musical works and pictorial, graphic and sculptural works included in public broadcasting transmissions. It does not extend to other works included in the transmissions, or to the entire transmission program.

It is the intent of the Committee that schools be permitted to engage in off-the-air reproduction to the extent and under the conditions provided in [section] 118(d)(3); however, in the event a public broadcasting station or producer makes the reproduction and distributes a copy to the school, the station or producer will not be held liable for the school's failure to destroy the reproduction, provided it has given notice of the requirement of destruction. In such a case the school itself, although it did not engage in the act of reproduction, is deemed an infringer fully subject to the remedies provided in Chapter 5 of the Act [§ 501 et seq. of this title]. The establishment of standards for adequate notice under this provision should be considered by the Commission.

Section 118(f) makes it clear that the rights of performance and other activities specified in subsection (d) do not extend to the unauthorized dramatization of a nondramatic musical work.

### References in Text

The antitrust laws, referred to in subsecs. (b) and (e)(1), are classified generally to chapter 1 (§ 1 et seq.) of Title 15, Commerce and Trade.

The effective date of this title, referred to in subsec. (b)(4), is Jan. 1, 1978.

EFFECTIVE DATE

Section effective Oct. 19, 1976, see section 102 of Pub. L. 94-553, set out as an Effective Date note preceding section 101 of this title.

CROSS REFERENCES

Determinations as to reasonable terms and rates of royalty payments by Copyright Royalty Tribunal, see section 801 of this title.

Exclusive rights in copyrighted work, see section 106 of this title.

Institution and conclusion of proceedings concerning the determination of reasonable terms and rates of royalty payments, see section 804 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 106, 114, 117, 501, 504, 801, 804 of this title.

## CHAPTER 2—COPYRIGHT OWNERSHIP AND TRANSFER

Sec.
201. Ownership of copyright.
202. Ownership of copyright as distinct from ownership of material object.
203. Termination of transfers and licenses granted by the author.
204. Execution of transfers of copyright ownership.
205. Recordation of transfers and other documents.

### § 201. Ownership of copyright

**(a) Initial ownership**

Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

**(b) Works made for hire**

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

**(c) Contributions to collective works**

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

**(d) Transfer of ownership**

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

**(e) Involuntary transfer**

When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2568, and amended Pub. L. 95-598, title III, § 313, Nov. 6, 1978, 92 Stat. 2676.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Initial Ownership.** Two basic and well-established principles of copyright law are restated in section 201(a): that the source of copyright ownership is the author of the work, and that, in the case of a "joint work," the coauthors of the work are likewise coowners of the copyright. Under the definition of section 101, a work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song). The definition of "joint work" is to be contrasted with the definition of "collective work," also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of "separate and independent works * * * into a collective whole."

The definition of "joint works" has prompted some concern lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors who actually work on the film, although their usual status as employees for hire would keep the question of coownership from coming up. On the other hand, although a novelist, playwright, or songwriter may write a work with the hope or expectation that it will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. In this case, the motion picture is a derivative work within the definition of that term, and section 103 makes plain that copyright in a derivative work is independent of, and does not enlarge the scope of rights in, any preexisting material incorporated in it. There is thus no need to spell this conclusion out in the definition of "joint work."

There is also no need for a specific statutory provision concerning the rights and duties of the coowners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.

**Works Made for Hire.** Section 201(b) of the bill [subsec. (b) of this section] adopts one of the basic

principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

The work-made-for-hire provisions of this bill represent a carefully balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures. Their proposal was for the recognition of something similar to the "shop right" doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extend needed for purposes of his regular business, but the employee would retain all other rights as long as he or she refrained from the authorizing of competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.

Of these, one of the most important categories is that of "instructional texts." This term is given its own definition in the bill: "a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities." The concept is intended to include what might be loosely called "textbook material," whether or not in book form or prepared in the form of text matter. The basic characteristic of "instructional texts" is the purpose of their preparation for "use in systematic instructional activities," and they are to be distinguished from works prepared for use by a general readership.

**Contributions to Collective Works.** Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the first owner of copyright in it. Under the definitions in section 101, a "collective work" is a species of "compilation" and, by its nature, must involve the selection, assembly, and arrangement of "a number of contributions." Examples of "collections works" would ordinarily include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases, such as a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a "separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 404 dealing with copyright notice, will preserve the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires, "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

**Transfer of Ownership.** The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d). Under that provision the ownership of a copyright, or of any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property upon the death of the owner. The term "transfer of copyright ownership" is defined in section 101 to cover any "conveyance, alienation, or hypothecation," including assignments, mortgages, and exclusive licenses, but not including nonexclusive licenses. Representatives of motion picture producers have argued that foreclosures of copyright mortgages should not be left to varying State laws, and that the statute should establish a Federal foreclosure system. However, the benefits of such a system would be of very limited application, and would not justify the complicated statutory and procedural requirements that would have to be established.

Clause (2) of subsection (d) contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "transfer of copyright ownership" in section 101 [section 101 of this title] makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right. The last sentence of section 201(d)(2) adds that the owner, with respect to the particular exclusive right he or she owns, is entitled "to all of the protection and remedies accorded to

the copyright owner by this title." It is thus clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, somehow who infringed that particular exclusive right.

Subsection (e) provides that when an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, have not previously been voluntarily transferred, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer. It is the intent of the subsection that the author be entitled, despite any purported expropriation or involuntary transfer, to continue exercising all rights under the United States statute, and that the governmental body or organization may not enforce or exercise any rights under this title in that situation.

It may sometimes be difficult to ascertain whether a transfer of copyright is voluntary or is coerced by covert pressure. But subsection (e) would protect foreign authors against laws and decrees purporting to divest them of their rights under the United States copyright statute, and would protect authors within the foreign country who choose to resist such covert pressures.

Traditional legal actions that may involve transfer of ownership, such as bankruptcy proceedings and mortgage foreclosures, are not within the scope of this subsection; the authors in such cases have voluntarily consented to these legal processes by their overt actions—for example, by filing in bankruptcy or by hypothecating a copyright.

AMENDMENTS

1978—Subsec. (e). Pub. L. 95-598 inserted ", except as provided under title 11".

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment effective Oct. 1, 1979, see section 402(a) of Pub. L. 95-598 set out as an Effective Date note preceding section 101 of Title 11, Bankruptcy.

CROSS REFERENCES

Copyright not capital asset, see section 1221 of Title 26, Internal Revenue Code.

Ownership by Government, see section 105 of this title.

### § 202. Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2568.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord—the original manuscript, the photographic negative, the unique painting or statue, the master tape recording, etc—in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

As a result of the interaction of this section and the provisions of sections, 204(a) and 301, the bill would change a common law doctrine exemplified by the decision in *Pushman* v. *New York Graphic Society, Inc.* 287 N.Y. 302, 39 N.E. 2d 249 (1942). Under that doctrine, authors or artists are generally presumed to transfer common law literary property rights when they sell their manuscript or work of art, unless those rights are specifically reserved. This presumption would be reversed under the bill, since a specific written conveyance of rights would be required in order for a sale of any material object to carry with it a transfer of copyright.

### § 203. Termination of transfers and licenses granted by the author

**(a) Conditions for termination**

In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of termination

Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2569.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**The Problem in General.** The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. sec. 24 [section 24 of former title 17]) should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

**Scope of the Provision.** Instead of being automatic, as is theoretically the case under the present renewal provision, the termination of a transfer or license under section 203 would require the serving of an advance notice within specified time limits and under specified conditions. However, although affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away. Under section 203(a) the right of termination would apply only to transfers and licenses executed after the effective date of the new statute [Jan. 1, 1978], and would have no retroactive effect.

The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by the author's successors in interest or to the author's own bequests. The scope of the right would extend not only to any "transfer of copyright ownership," as defined in section 101, but also to nonexclusive licenses. The right

of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance in the development of the bill.

**Who Can Terminate a Grant.** Two issues emerged from the disputes over section 203 as to the persons empowered to terminate a grant: (1) the specific classes of beneficiaries in the case of joint works; and (2) whether anything less than unanimous consent of all those entitled to terminate should be required to make a termination effective. The bill to some extent reflects a compromise on these points, including a recognition of the dangers of one or more beneficiaries being induced to "hold out" and of unknown children or grandchildren being discovered later. The provision can be summarized as follows:

1. In the case of a work of joint authorship, where the grant was signed by two or more of the authors, majority action by those who signed the grant, or by their interests, would be required to terminate it.

2. There are three different situations in which the shares of joint authors, or of a dead author's widow or widower, children, and grandchildren, must be divided under the statute: (1) The right to effect a termination; (2) the ownership of the terminated rights; and (3) the right to make further grants of reverted rights. The respective shares of the authors, and of a dead author's widow or widower, children, and grandchildren, would be divided in exactly the same way in each of these situations. The terms "widow," "widower," and "children" are defined in section 101 in an effort to avoid problems and uncertainties that have arisen under the present renewal section.

3. The principle of per stirpes representation would also be applied in exactly the same way in all three situations. Take for example, a case where a dead author left a widow, two living children, and three grandchildren by a third child who is dead. The widow will own half of the reverted interests, the two children will each own 16⅔ percent, and the three grandchildren will each own a share of roughly 5½ percent. But who can exercise the right of termination? Obviously, since she owns 50 percent, the widow is an essential party, but suppose neither of the two surviving children is willing to join her in the termination; is it enough that she gets one of the children of the dead child to join, or can the dead child's interest be exercised only by the action of a majority of his children? Consistent with the per stirpes principle, the interest of a dead child can be exercised only as a unit by majority action of his surviving children. Thus, even though the widow and one grandchild would own 55½ percent of the reverted copyright, they would have to be joined by another child or grandchild in order to effect a termination or a further transfer of reverted rights. This principle also applies where, for example, two joint authors executed a grant and one of them is dead; in order to effect a termination, the living author must be joined by a per stirpes majority of the dead author's beneficiaries. The notice of termination may be signed by the specified owners of termination interests or by "their duly authorized agents," which would include the legally appointed guardians or committees of persons incompetent to sign because of age or mental disability.

**When a Grant Can be Terminated.** Section 203 draws a distinction between the date when a termination becomes effective and the earlier date when the advance notice of termination is served. With respect to the ultimate effective date, section 203(a)(3) provides, as a general rule, that a grant may be terminated during the 5 years following the expiration of a period of 35 years from the execution of the grant. As an exception to this basic 35-year rule, the bill also provides that "if the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier." This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.

The effective date of termination, which must be stated in the advance notice, is required to fall within the 5 years following the end of the applicable 35- or 40-year period, but the advance notice itself must be served earlier. Under section 203(a)(4)(A), the notice must be served "not less than two or more than ten years" before the effective date stated in it.

As an example of how these time-limit requirements would operate in practice, we suggest two typical contract situations:

Case 1: Contract for theatrical production signed on September 2, 1987. Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year termination period). Assuming that the author decides to terminate on September 1, 2022 (the earliest possible date) the advance notice must be filed between September 1, 2012 and September 1, 2020.

Case 2: Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, 2022 (35 years from publication). Assuming that the author decides to make the termination effective on January 1, 2024, the advance notice would have to be served between January 1, 2014, and January 1, 2022.

**Effect of Termination.** Section 203(b) makes clear that, unless effectively terminated within the applicable 5-year period, all rights covered by an existing grant will continue unchanged, and that rights under other Federal, State, or foreign laws are unaffected. However, assuming that a copyright transfer or license is terminated under section 203, who are bound by the termination and how are they affected?

Under the bill, termination means that ownership of the rights covered by the terminated grant reverts to everyone who owns termination interests on the date the notice of termination was served, whether they joined in signing the notice or not. In other words, if a person could have signed the notice, that person is bound by the action of the majority who did; the termination of the grant will be effective as to that person, and a proportionate share of the reverted rights automatically vests in that person. Ownership is divided proportionately on the same per stirpes basis as that provided for the right to effect termination under section 203(a) and, since the reverted rights vest on the date notice is served, the heirs of a dead beneficiary would inherit his or her share.

Under clause (3) of subsection (b), majority action is required to make a further grant of reverted rights. A problem here, of course, is that years may have passed between the time the reverted rights vested and the time the new owners want to make a further transfer; people may have died and children may have been born in the interim. To deal with this problem, the bill looks back to the date of vesting; out of the group in whom rights vested on that date, it requires the further transfer or license to be signed by "the same number and proportion of the owners" (though not necessarily the same individuals) as were then required to terminate the grant under subsection (a). If some of those in whom the rights originally vested have died, their "legal representatives, legatees, or heirs at law" may represent them for this purpose and, as in the case of the termination itself, any one of the minority who does not join in the further grant is nevertheless bound by it.

An important limitation on the rights of a copyright owner under a terminated grant is specified in section 203(b)(1). This clause provides that, notwithstanding a termination, a derivative work prepared earlier may

"continue to be utilized" under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off. For this purpose, a motion picture would be considered as a "derivative work" with respect to every "preexisting work" incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture.

Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running. However, the bill seeks to avoid the situation that has arisen under the present renewal provision, in which third parties have bought up contingent future interests as a form of speculation. Section 203(b)(4) would make a further grant of rights that revert under a terminated grant valid "only if it is made after the effective date of the termination." An exception, in the nature of a right of "first refusal," would permit the original grantee or a successor of such grantee to negotiate a new agreement with the persons effecting the termination at any time after the notice of termination has been served.

Nothing contained in this section or elsewhere in this legislation is intended to extend the duration of any license, transfer or assignment made for a period of less than thirty-five years. If, for example, an agreement provides an earlier termination date or lesser duration, or if it allows the author the right of cancelling or terminating the agreement under certain circumstances, the duration is governed by the agreement. Likewise, nothing in this section or legislation is intended to change the existing state of the law of contracts concerning the circumstances in which an author may cancel or terminate a license, transfer, or assignment.

Section 203(b)(6) provides that, unless and until termination is effected under this section, the grant, "if it does not provide otherwise," continues for the term of copyright. This section means that, if the agreement does not contain provisions specifying its term or duration, and the author has not terminated the agreement under this section, the agreement continues for the term of the copyright, subject to any right of termination under circumstances which may be specified therein. If, however, an agreement does contain provisions governing its duration—for example, a term of fifty years—and the author has not exercised his or her right of termination under the statute, the agreement will continue according to its terms—in this example, for only fifty years. The quoted language is not to be construed as requiring agreements to reserve the right of termination.

### § 204. Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgement is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if—

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2570.)

#### Historical and Revision Notes

##### House Report No. 94-1476

Section 204 is a somewhat broadened and liberalized counterpart of sections 28 and 29 of the present statute [sections 28 and 29 of former title 17]. Under subsection (a), a transfer of copyright ownership (other than one brought about by operation of law) is valid only if there exists an instrument of conveyance, or alternatively a "note or memorandum of the transfer," which is in writing and signed by the copyright owner "or such owner's duly authorized agent." Subsection (b) makes clear that a notarial or consular acknowledgment is not essential to the validity of any transfer, whether executed in the United States or abroad. However, the subsection would liberalize the conditions under which certificates of acknowledgment of documents executed abroad are to be accorded prima facie weight, and would give the same weight to domestic acknowledgments under appropriate circumstances.

### § 205. Recordation of transfers and other documents

**(a) Conditions for recordation**

Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document.

**(b) Certificate of recordation**

The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

**(c) Recordation as constructive notice**

Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

**(d) Recordation as prerequisite to infringement suit**

No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

**(e) Priority between conflicting transfers**

As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice

under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

**(f) Priority between conflicting transfer of ownership and nonexclusive license**

A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if—

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2571.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The recording and priority provisions of section 205 are intended to clear up a number of uncertainties arising from sections 30 and 31 of the present law [sections 30 and 31 of former title 17] and to make them more effective and practical in operation. Any "document pertaining to a copyright" may be recorded under subsection (a) if it "bears that actual signature of the person who executed it," or if it is appropriately certified as a true copy. However, subsection (c) makes clear that the recorded document will give constructive notice of its contents only if two conditions are met: (1) the document or attached material specifically identifies the work to which it pertains so that a reasonable search under the title or registration number would reveal it, and (2) registration has been made for the work. Moreover, even through the Register of Copyrights may be compelled to accept for recordation documents that on their face appear self-serving or colorable, the Register should take care that their nature is not concealed from the public in the Copyright Office's indexing and search reports.

The provisions of subsection (d), requiring recordation of transfers as a prerequiste to the institution of an infringement suit, represent a desirable change in the law. The one- and three-month grace periods provided in subsection (e) are a reasonable compromise between those who want a longer hiatus and those who argue that any grace period makes it impossible for a bone fide transferee to rely on the record at any particular time.

Under subsection (f) of section 205, a nonexclusive license in writing and signed, whether recorded or not, would be valid against a later transfer, and would also prevail as against a prior unrecorded transfer if taken in good faith and without notice. Objections were raised by motion picture producers, particularly to the provision allowing unrecorded nonexclusive licenses to prevail over subsequent transfers, on the ground that a nonexclusive license can have drastic effects on the value of a copyright. On the other hand, the impracticalities and burdens that would accompany any requirement of recordation of nonexclusive licenses outweigh the limited advantages of a statutory recordation system for them.

REGISTRATION OF CLAIMS TO COPYRIGHTS AND RECORDATION OF ASSIGNMENTS OF COPYRIGHTS AND OTHER INSTRUMENTS UNDER PREDECESSOR PROVISIONS

Recordation of assignments of copyrights or other instruments received in the Copyright Office before Jan. 1, 1978, to be made in accordance with this title as it existed on Dec. 31, 1977, see section 109 of Pub. L. 94-553, set out as a note under section 410 of this title.

CROSS REFERENCES

Copyright infringement action as subject to requirements of this section, see section 501 of this title.

Fee for recordation of a transfer of copyright ownership, see section 708 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 501, 708 of this title.

## CHAPTER 3—DURATION OF COPYRIGHT

Sec.
301. Preemption with respect to other laws.
302. Duration of copyright: Works created on or after January 1, 1978.
303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978.
304. Duration of copyright: Subsisting copyrights.
305. Duration of copyright: Terminal date.

### § 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2572.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Single Federal System.** Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works, which has been the system in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is "created" or, as that term is defined in section 101 when it is "fixed in a copy or phonorecord for the first time." Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.

By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship. The main arguments in favor of a single Federal system can be summarized as follows:

1. One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

2. "Publication," perhaps the most important single concept under the present law, also represents its most serious defect. Although at one time when works were disseminated almost exclusively through printed copies, "publication" could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.

3. Enactment of section 301 [this section] would also implement the "limited times" provision of the Constitution [U.S.C Const. Art. 1. § 8, Cl. 8], which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication"; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by making unpublished, undisseminated manuscripts available for publication after a reasonable period.

4. Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Under section 3C1, the statute would apply to all works created after its effective date [Jan 1, 1978], whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute [Jan. 1, 1978] and still under common law protection, section 303 of the statute would provide protection from that date on, and would guarantee a minimum period of statutory copyright.

**Preemption of State Law.** The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

Under section 301(a) all "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" are governed exclusively by the Federal copyright statute if the works involved are works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103." All corresponding State laws, whether common law or statutory, are preempted and abrogated. Regardless of when the work was created and whether it is published or unpublished, disseminated or undisseminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright. Section 1338 of title 28, United States Code also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts. The preemptive effect of section 301 is limited to State laws; as stated expressly in subsection (d) of section 301, there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 1, section 8 [U.S.C. Const. Art 1, § 8, cl. 8].

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain. On the other hand section 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down. As mentioned above in connection with section 102, unfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statute or common law until fixed in tangible form.

The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.

Representatives of printers, while not opposed to the principle of section 301, expressed concern about its potential impact on protection of preliminary advertising copy and layouts prepared by printers. They argued that this material is frequently "pirated" by competitors, and that it would be a substantial burden if, in order to obtain full protection, the printer would have to make registrations and bear the expense and bother of suing in Federal rather than State courts. On the other hand, these practical problems are essentially procedural rather than substantive, and the proposal for a special exemption to preserve common law rights equivalent to copyright in unpublished advertising material cannot be justified. Moreover, subsection (b), discussed below, will preserve other legal grounds on which the printers can protect themselves against "pirates" under State laws.

In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co.*, v. *Stiffel Co.*, 376 U. S. 225 [84 S.Ct. 784, 11 L.Ed.2d 661, rehearing denied 84 S.Ct. 1131, 376 U.S. 973, 12 L.Ed.2d 87], and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 [84 S.Ct. 779, 11 L.Ed.2d 669, rehearing denied 84 S.Ct. 1162, 377 U. S. 913, 12 L.Ed.2d 183], that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute.

The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) subject matter that does not come within the subject matter of copyright; (2) causes of action arising under State law before the effective date of the statute [Jan. 1, 1978]; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as "interference with contract relations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—"deceptive trade practices such as passing off and false representation"—represents an effort to distinguish between those causes of action known as "unfair competition" that the copyright statute is not intended to preempt and those that it is. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.

"Misappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service* v. *Associated Press*, 248 U.S. 215 (1918) [39 S.Ct. 68, 63 L.Ed. 211], or in the newer form of data updates from scientific, business, or financial data bases. Likewise, a person having no trust or other relationship with the proprietor of a computerized data base should not be immunized from sanctions against electronically or cryptographically breaching the proprietor's security arrangements and accessing the proprietor's data. The unauthorized data access which should be remediable might also be achieved by the intentional interception of data transmissions by wire, microwave or laser transmissions, or by the common unintentional means of "crossed" telephone lines occasioned by errors in switching.

The proprietor of data displayed on the cathode ray tube of a computer terminal should be afforded protection against unauthorized printouts by third parties (with or without improper access), even if the data are not copyrightable. For example, the data may not be copyrighted because they are not fixed in a tangible medium of expression (i.e., the data are not displayed for a period or not more than transitory duration).

Nothing contained in section 301 precludes the owner of a material embodiment of a copy or a phonorecord from enforcing a claim of conversion against one who takes possession of the copy or phonorecord without consent.

A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 12, 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection. In its testimony during the 1975 hearings, the Department of Justice pointed out that, under section 301 as then written:

> This language could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribe activities violating rights equivalent to * * * the exclusive rights within the general scope of copyright. * * * Certainly such a result cannot have been intended for it would likely effect the immediate resurgence of piracy of pre-February 15, 1972, sound recordings.

The Department recommended that section 301(b) be amended to exclude sound recordings fixed prior to February 15, 1972 from the effect of the preemption.

The Senate adopted this suggestion when it passed S. 22. The result of the Senate amendment would be to leave pre-1972 sound recordings as entitled to perpetual protection under State law, while post-1972 recordings would eventually fall into the public domain as provided in the bill.

The Committee recognizes that, under recent court decisions, pre-1972 recordings are protected by State statute or common law, and that should not all be thrown into the public domain instantly upon the coming into effect of the new law. However, it cannot agree that they should in effect be accorded perpetual protection, as under the Senate amendment, and it has therefore revised clause (4) to establish a future date for the pre-emption to take effect. The date chosen is February 15, 2047 which is 75 years from the effective date of the statute extending Federal protection to recordings.

Subsection (c) makes clear that nothing contained in Title 17 annuls or limits any rights or remedies under any other Federal statute.

### § 302. Duration of copyright: Works created on or after January 1, 1978

#### (a) In general

Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

#### (b) Joint works

In the case of a joint work prepared by two or more authors who did not work for hire, the

copyright endures for a term consisting of the life of the last surviving author and fifty years after such last surviving author's death.

**(c) Anonymous works, pseudonymous works, and works made for hire**

In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

**(d) Records relating to death of authors**

Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

**(e) Presumption as to author's death**

After a period of seventy-five years from the year of first publication of a work, or a period of one hundred years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than fifty years before, is entitled to the benefits of a presumption that the author has been dead for at least fifty years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2572.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

**In General.** The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law. With certain exceptions, there appears to be strong support for the principle, as embodied in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill.

Under the present law statutory copyright protection begins on the date of publication (or on the date of registration in unpublished form) and continues for 28 years from that date; it may be renewed for a second 28 years, making a total potential term of 56 years in all cases. [Under Public Laws 87–668, 89–142, 90–141, 90–416, 91–147, 91–555, 92–170, 92–566, and 93–573, copyrights that were subsisting in their renewal term on September 19, 1962, and that were scheduled to expire before Dec. 31, 1976, have been extended to that later date, in anticipation that general revision legislation extending their terms still further will be enacted by then.] The principal elements of this system—a definite number of years, computed from either publication or registration, with a renewal feature—have been a part of the U.S. copyright law since the first statute in 1790. The arguments for changing this system to one based on the life of the author can be summarized as follows:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.

2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.

3. Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication," and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only date that a potential user would have to worry about. All of a particular author's works, including successive revisions of them, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.

5. One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases

it is the cause of inadvertent and unjust loss of copyright. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary.

6. Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giving up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated by means other than publication. A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights.

7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.

The need for a longer total term of copyright has been conclusively demonstrated. It is true that a major reason for the striking statistical increase in life expectancy since 1909 is the reduction in infant mortality, but this does not mean that the increase can be discounted. Although not nearly as great as the total increase in life expectancy, there has been a marked increase in longevity, and with medical discoveries and health programs for the elderly this trend shows every indication of continuing. If life expectancy in 1909, which was in the neighborhood of 56 years, offered a rough guide to the length of copyright protection, then life expectancy in the 1970's which is well over 70 years, should offer a similar guide; the Register's 1961 Report included statistics indicating that something between 70 and 76 years was then the average equivalent of life-plus-50 years. A copyright should extend beyond the author's lifetime, and judged by this standard the present term of 56 years is too short.

The arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity that would result from adoption of a life-plus-50 term, are also highly significant. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier. The registry of death dates and the system of presumptions established in section 302 would solve most of the problems in determining when an individual author died.

No country in the world has provisions on the duration of copyright like ours. Virtually every other copyright law in the world bases the term of protection for works by natural persons on the life of the author, and a substantial majority of these accord protection for 50 years after the author's death. This term is required for adherence to the Berne Convention. It is worth noting that the 1965 revision of the copyright law of the Federal Republic of Germany adopted a term of life plus 70 years.

A point that has concerned some educational groups arose from the possibility that, since a large majority (now about 85 percent) of all copyrighted works are not renewed, a life-plus-50 year term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions. A statistical study of renewal registrations made by the Copyright Office in 1966 supports the generalization that most material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there are a large number of unrenewed works that have scholarly value to historians, archivists, and specialists in a variety of fields. This consideration lay behind the proposals for retaining the renewal device or for limiting the term for unpublished or unregistered works.

It is true that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system. Moreover, it is important to realize that the bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. The advantages of a basic term of copyright enduring for the life of the author and for 50 years after the author's death outweigh any possible disadvantages.

**Basic Copyright Term.** Under subsection (a) of section 302, a work "created" on or after the effective date of the revised statute [Jan. 1, 1978] would be protected by statutory copyright "from its creation" and, with exceptions to be noted below, "endures for a term consisting of the life of the author and 50 years after the author's death."

Under this provision, as a general rule, the life-plus-50 term would apply equally to unpublished works, to works published during the author's lifetime, and to works published posthumously.

The definition of "created" in section 101, which will be discussed in more detail in connection with section 302(c) below, makes clear that "creation" for this purpose means the first time the work is fixed in a copy or phonorecord; up to that point the work is not "created," and is subject to common law protection, even though it may exist in someone's mind and may have been communicated to others in unfixed form.

**Joint Works.** Since by definition a "joint work" has two or more authors, a statute basing the term of copyright on the life of the author must provide a special method of computing the term of "joint works." Under the system in effect in many foreign countries, the term of copyright is measured from the death of the last survivor of a group of joint authors, no matter how many there are. The bill adopts this system as the simplest and fairest of the alternatives for dealing with the problem.

**Anonymous Works, Pseudonymous Works, and Works Made for Hire.** Computing the term from the author's death also requires special provisions to deal with cases where the authorship is not revealed or where the "author" is not an individual. Section 302(c) therefore provides a special term for anonymous works, pseudonymous works, and works made for hire: 75 years from publication or 100 years from creation, whichever is shorter. The definitions in section 101 make the status of anonymous and pseudonymous works depend on what is revealed on the copies or phonorecords of a work; a work is "anonymous" if "no natural person is identified as author," and is "pseudonymous" if "the author is identified under a fictitious name."

Section 302(c) provides that the 75- and 100-year terms for an anonymous or pseudonymous work can be converted to the ordinary life-plus-50 term if "the identity of one or more authors * * * is revealed" in special records maintained for this purpose in the

Copyright Office. The term in such cases would be "based on the life of the author or authors whose identity has been revealed." Instead of forcing a user to search through countless Copyright Office records to determine if an author's identity has been revealed, the bill sets up a special registry for the purpose, with requirements concerning the filing of identifying statements that parallel those of the following subsection (d) with respect to statements of the date of an author's death.

The alternative terms established in section 302(c)—75 years from publication or 100 years from creation, whichever expires first—are necessary to set a time limit on protection of unpublished material. For example, copyright in a work created in 1978 and published in 1988 would expire in 2063 (75 years from publication). A question arises as to when the copyright should expire if the work is never published. Both the Constitution and the underlying purposes of the bill require the establishment of an alternative term for unpublished work and the only practicable basis for this alternative is "creation." Under the bill a work created in 1980 but not published until after 2005 (or never published) would fall into the public domain in 2080 (100 years after creation).

The definition in section 101 provides that "creation" takes place when a work "is fixed in a copy or phonorecord for the first time." Although the concept of "creation" is inherently lacking in precision, its adoption in the bill would, for example, enable a scholar to use an unpublished manuscript written anonymously, pseudonymously, or for hire, if he determines on the basis of internal or external evidence that the manuscript is at least 100 years old. In the case of works written over a period of time or in successive revised versions, the definition provides that the portion of the work "that has been fixed at any particular time constitutes the work as of that time," and that, "where the work has been prepared in different versions, each version constitutes a separate work." Thus, a scholar or other user, in attempting to determine whether a particular work is in the public domain, needs to look no further than the particular version he wishes to use.

Although "publication" would no longer play the central role assigned to it under the present law, the concept would still have substantial significance under provisions throughout the bill, including those on Federal preemption and duration. Under the definition in section 101 [section 101 of this title], a work is "published" if one or more copies or phonorecords embodying it are distributed to the public—that is, generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents—without regard to the manner in which the copies or phonorecords changed hands. The definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work. On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcasters, motion picture theaters, etc., publication takes place if the purpose is "further distribution, public performance, or public display."

Although the periods of 75 or 100 years for anonymous and pseudonymous works and works made for hire seem to be longer than the equivalent term provided by foreign laws and the Berne Conventions, this difference is more apparent than real. In general, the terms in these special cases approximate, on the average, the term of the life of the author plus 50 years established for other works. The 100-year maximum term for unpublished works, although much more limited than the perpetual term now available under common law in the United States and under statute in some foreign countries, is sufficient to guard against unjustified invasions of privacy and to fulfill our obligations under the Universal Copyright Convention.

**Records and Presumption as to Author's Death.** Subsections (d) and (e) of section 302 together furnish an answer to the practical problems of how to discover the death dates of obscure or unknown authors. Subsection (d) provides a procedure for recording statements that an author died, or that he was still living, on a particular date, and also requires the Register of Copyrights to maintain obituary records on a current basis. Under subsection (e) anyone who, after a specified period, obtains certification from the Copyright Office that its records show nothing to indicate that the author is living or died less than 50 years before, is entitled to rely upon a presumption that the author has been dead for more than 50 years. The period specified in subsection (e)—75 years from publication or 100 years from creation—is purposely uniform with the special term provided in subsection (c).

CROSS REFERENCES

Duration and renewal of registration of trade-marks, see sections 1058 and 1059 of Title 15, Commerce and Trade.

Duration of term of patents, see section 154 of Title 35, Patents.

Fee for recordation of statement revealing identity of author of anonymous or pseudonymous work or for statement relating to death of author, see section 708 of this title.

Notice of copyright, error in date as affecting duration, see section 406 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 303, 305, 406, 708 of this title.

### § 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2573.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence.

Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law [Jan. 1, 1978]; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date [Jan. 1, 1978] through 2030 (50 years after the author's death).

A special problem under this provision is what to do with works whose ordinary statutory terms will have

expired or will be nearing expiration on the effective date [Jan. 1, 1978]. The committee believes that a provision taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a "reasonable period" for this purpose. Section 303 [this section] provides that under no circumstances would copyright protection expire before December 31, 2002, and also attempts to encourage publication by providing 25 years more protection (through 2027) if the work were published before the end of 2002.

CROSS REFERENCES

Duration and renewal of registration of trade-marks, see sections 1058 and 1059 of Title 15, Commerce and Trade.

Duration of term of patents, see section 154 of Title 35, Patents.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 301, 305 of this title.

**§ 304. Duration of copyright: Subsisting copyrights**

**(a) Copyrights in their first term on January 1, 1978**

Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

**(b) Copyrights in their renewal term or registered for renewal before January 1, 1978**

The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

**(c) Termination of transfers and licenses covering extended renewal term**

In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more

of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2573.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The arguments in favor of lengthening the duration of copyright apply to subsisting as well as future copyrights. The bill's basic approach is to increase the present 56-year term to 75 years in the case of copyrights subsisting in both their first and their renewal terms.

**Copyrights in Their First Term.** Subsection (a) of section 304 reenacts and preserves the renewal provision, now in Section 24 of the statute [section 24 of former title 17], for all of the works presently in their first 28-year term. A great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests. Renewal registration will be required during the 28th year of the copyright but the length of the renewal term will be increased from 28 to 47 years.

Although the bill preserves the language of the present renewal provision without any change in substance, the Committee intends that the reference to a "posthumous work" in this section has the meaning given to it in *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975)—one as to which no copyright assignment or other contract for exploitation of the work has occurred during an author's lifetime, rather than one which is simply first published after the author's death.

**Copyrights in Their Renewal Term.** Renewed copyrights that are subsisting in their second term at any time during the period between December 31, 1976, and December 31, 1977, inclusive, would be extended under section 304(b) to run for a total of 75 years. This provision would add another 19 years to the duration of any renewed copyright whose second term started during the 28 years immediately preceding the effec-

tive date of the act (January 1, 1978). In addition, it would extend by varying lesser amounts the duration of renewal copyrights already extended under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573, all of which would otherwise expire on December 31, 1976. The subsection would also extend the duration of renewal copyrights whose second 28-year term is scheduled to expire during 1977. In none of these cases, however, would the total terms of copyright for the work be longer than 75 years.

Subsection (b) also covers the special situation of a subsisting first-term copyright that becomes eligible for renewal registration during the year before the act comes into effect. If a renewal registration is not made before the effective date [Jan. 1, 1978], the case is governed by the provisions of section 304(a) [subsec. (a) of this section]. If a renewal registration is made during the year before the new law takes effect, however, the copyright would be treated as if it were already subsisting in its second term and would be extended to the full period of 75 years without the need for further renewal.

**Termination of Grants Covering Extended Term.** An issue underlying the 19-year extension of renewal terms under both subsections (a) and (b) of section 304 [subsecs. (a) and (b) of this section] is whether, in a case where their rights have already been transferred, the author or the dependents of the author should be given a chance to benefit from the extended term. The arguments for granting rights of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.

Subsection (c) of section 304 is a close but not exact counterpart of section 203. In the case of either a first-term or renewal copyright already subsisting when the new statute becomes effective [Jan. 1, 1978], any grant of rights covering the renewal copyright in the work, executed before the effective date [Jan. 1, 1978], may be terminated under conditions and limitations similar to those provided in section 203. Except for transfers and licenses covering renewal copyrights already extended under Public Law 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573, which would become subject to termination immediately upon the coming into effect of the revised law, the 5-year period during which termination could be made effective would start 56 years after copyright was originally secured.

The bill distinguishes between the persons who can terminate a grant under section 203 and those entitled to terminate a grant covering an extended term under section 304 [this section]. Instead of being limited to transfers and licenses executed by the author, the right of termination under section 304(c) also extends to grants executed by those beneficiaries of the author who can claim renewal under the present law: his or her widow or widower, children, executors, or next of kin.

There is good reason for this difference. Under section 203, an author's widow or widower and children are given rights of termination if the author is dead, but these rights apply only to grants by the author, and any effort by a widow, widower, or child to transfer contingent future interests under a termination would be ineffective. In contrast, under the present renewal provisions, any statutory beneficiary of the author can make a valid transfer of license of future renewal rights, which is completely binding if the author is dead and the person who executed the grant turns out to be the proper renewal claimant. Because of this, a great many contingent transfers of future renewal rights have been obtained from widows, widowers, children, and next of kin, and a substantial number of these will be binding. After the present 28-year renewal period has ended, a statutory beneficiary who has signed a disadvantageous grant of this sort should have the opportunity to reclaim the extended term.

As explained above in connection with section 203, the bill adopts the principle that, where a transfer or license by the author is involved, termination may be effected by a per stirpes majority of those entitled to terminate, and this principle also applies to the ownership of rights under a termination and to the making of further grants of reverted rights. In general, this principle has also been adopted with respect to the termination of rights under an extended renewal copyright in section 304, but with several differences made necessary by the differences between the legal status of transfers and licenses made after the effective date of the new law [Jan. 1, 1978] (governed by section 203) and that of grants of renewal rights made earlier and governed by section 304(c). The following are the most important distinctions between the termination rights under the two sections:

*1. Joint Authorship.*—Under section 304, a grant of renewal rights executed by joint authors during the first term of copyright would be effective only as to those who were living at the time of renewal; where any of them are dead, their statutory beneficiaries are entitled to claim the renewal independently as a new estate. It would therefore be inappropriate to impose a requirement of majority action with respect to transfers executed by two or more joint authors.

*2. Grants Not Executed by Author.*—Section 304(c) adopts the majority principle underlying the amendments of section 203 [section 203 of this title] with respect to the termination rights of a dead author's widow or widower and children. There is much less reason, as a matter of policy, to apply this principle in the case of transfers and licenses of renewal rights executed under the present law by the author's widow, widower, children, executors, or next of kin, and the practical arguments against doing so are conclusive. It is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law, and greater difficulties would be presented if any attempt were made to apply the majority principle to further beneficiaries in cases where one or more of the renewal beneficiaries are dead. Therefore, where the grant was executed by a person or persons other than the author, termination can be effected only by the unanimous action of the survivors of those who executed it.

*3. Further Grants.*—The reason against adopting a principle of majority action with respect to the right to terminate grants by joint authors and grants not executed by the author apply equally with respect to the right to make further grants under section 304(c). The requirement for majority action in clause (6)(C) is therefore confined to cases where the rights under a grant by the author have reverted to his or her widow or widower, or children, or both. Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner would have an independent right to sell his share, or to use or license the work subject to an accounting.

Nothing contained in this section or elsewhere in this legislation is intended to extend the duration of any license, transfer, or assignment made for a period of less than fifty-six years. If, for example, an agreement provides an earlier termination date or lesser duration, or if it allows the author the right of cancelling or terminating the agreement under certain circumstances, the duration is governed by the agreement. Likewise, nothing in this section or legislation is intended to change the existing state of the law of contracts concerning the circumstances in which an author may terminate a license, transfer or assignment.

Section 304(c)(6)(E) provides that, unless and until termination is effected under this section, the grant,

"if it does not provide otherwise," continues for the term of copyright. This section means that, if the agreement does not contain provisions specifying its term or duration, and the author has not terminated the agreement under this section, the agreement continues for the term of the copyright, subject to any right of termination under circumstances which may be specified therein. If, however, an agreement does contain provisions governing its duration—for example, a term of sixty years—and the author has not exercised his or her right of termination under the statute, the agreement will continue according to its terms—in this example, for only sixty years. The quoted language is not to be construed as requiring agreements to reserve the right of termination.

EFFECTIVE DATE

Subsec. (b) of this section effective Oct. 19, 1976, see section 102 of Pub. L. 94-553, set out as an Effective Date note preceding section 101 of this title.

AD INTERIM COPYRIGHTS SUBSISTING OR CAPABLE OF BEING SECURED UNDER PREDECESSOR PROVISIONS

Section 107 of Pub. L. 94-553 provided that: "In the case of any work in which an ad interim copyright is subsisting or is capable of being secured on December 31, 1977, under section 22 of title 17 as it existed on that date, copyright protection is hereby extended to endure for the term or terms provided by section 304 of title 17 as amended by the first section of this Act [this section]."

CROSS REFERENCES

Alternative to separate renewal registrations for group works by single author, see section 408 of this title.

Duration and renewal of registration of trade-marks, see sections 1058 and 1059 of Title 15, Commerce and Trade.

Duration of term of patents, see section 154 of Title 35, Patents.

Fee for registration of claim to renewal of subsisting copyright in first term, see section 708 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 305, 408, 708 of this title.

### § 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2576.)

CROSS REFERENCES

Duration and renewal of registration of trade-marks, see sections 1058 and 1059 of Title 15, Commerce and Trade.

Duration of term of patents, see section 154 of Title 35, Patents.

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Under section 305, which has its counterpart in the laws of most foreign countries, the term of copyright protection for a work extends through December 31 of the year in which the term would otherwise have expired. This will make the duration of copyright much easier to compute, since it will be enough to determine the year, rather than the exact date, of the event from which the term is based.

Section 305 applies only to "terms of copyright provided by sections 302 through 304," which are the sections dealing with duration of copyright. It therefore has no effect on the other time periods specified in the bill; and, since they do not involve "terms of copyright," the periods provided in section 304(c) with respect to termination of grants are not affected by section 305.

The terminal date section would change the duration of subsisting copyrights under section 304 by extending the total terms of protection under subsections (a) and (b) to the end of the 75th year from the date copyright was secured. A copyright subsisting in its first term on the effective date of the act [Jan. 1, 1978] would run through December 31 of the 28th year and would then expire unless renewed. Since all copyright terms under the bill expire on December 31, and since section 304(a) requires that renewal be made "within one year prior to the expiration of the original term of copyright," the period for renewal registration in all cases will run from December 31 through December 31.

A special situation arises with respect to subsisting copyrights whose first 28-year term expires during the first year after the act comes into effect. As already explained in connection with section 304(b), if a renewal registration for a copyright of this sort is made before the effective date [Jan. 1, 1978], the total term is extended to 75 years without the need for a further renewal registration. But, if renewal has not yet been made when the act becomes effective [Jan. 1, 1978], the period for renewal registration may in some cases be extended. If, as the bill provides, the act becomes effective on January 1, 1978, a copyright that was originally secured on September 1, 1950, could have been renewed by virtue of the present statute between September 1, 1977, and December 31, 1977; if not, it can still be renewed under section 304(a) of the new act between January 1, 1978, and December 31, 1978.

## CHAPTER 4—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

Sec.
401. Notice of copyright: Visually perceptible copies.
402. Notice of copyright: Phonorecords of sound recordings.
403. Notice of copyright: Publications incorporating United States Government works.
404. Notice of copyright: Contributions to collective works.
405. Notice of copyright: Omission of notice.
406. Notice of copyright: Error in name or date.
407. Deposit of copies or phonorecords for Library of Congress.
408. Copyright registration in general.
409. Application for copyright registration.
410. Registration of claim and issuance of certificate.
411. Registration as prerequisite to infringement suit.
412. Registration as prerequisite to certain remedies for infringement.

### § 401. Notice of copyright: Visually perceptible copies

**(a) General requirement**

Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

**(b) Form of notice**

The notice appearing on the copies shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), or the word "Copyright", or the abbreviation "Copr."; and

(2) the year of first publication of the work; in the case of compilations, or derivative

works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

**(c) Position of notice**

The notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2576.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

A requirement that the public be given formal notice of every work in which copyright is claimed was a part of the first U.S. copyright statute enacted in 1790, and since 1802 our copyright laws have always provided that the published copies of copyrighted works must bear a specified notice as a condition of protection. Under the present law the copyright notice serves four principal functions:

(1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;

(2) It informs the public as to whether a particular work is copyrighted;

(3) It identifies the copyright owner; and

(4) It shows the date of publication.

Ranged against these values of a notice requirement are its burdens and unfairness to copyright owners. One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice. It has been contended that the disadvantages of the notice requirement outweigh its values and that it should therefore be eliminated or substantially liberalized.

The fundamental principle underlying the notice provisions of the bill is that the copyright notice has real values which should be preserved, and that this should be done by inducing use of notice without causing outright forfeiture for errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of copyright notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after publication. Errors in the name or date in the notice could be corrected without forfeiture of copyright.

Sections 401 and 402 set out the basic notice requirements of the bill, the former dealing with "copies from which the work can be visually perceived," and the latter covering "phonorecords" of a "sound recording." The notice requirements established by these parallel provisions apply only when copies or phonorecords of the work are "publicly distributed." No copyright notice would be required in connection with the public display of a copy by any means, including projectors, television, or cathode ray tubes connected with information storage and retrieval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmission, or any other process.

It should be noted that, under the definition of "publication" in section 101, there would no longer be any basis for holding, as a few court decisions have done in the past, that the public display of a work of art under some conditions (e.g., without restriction against its reproduction) would constitute publication of the work. And, as indicated above, the public display of a work of art would not require that a copyright notice be placed on the copy displayed.

Subsections (a) of both section 401 and section 402 require that a notice be used whenever the work "is published in the United States or elsewhere by authority of the copyright owner." The phrase "or elsewhere," which does not appear in the present law, makes the notice requirements applicable to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published. The values of notice are fully applicable to foreign editions of works copyrighted in the United States, especially with the increased flow of intellectual materials across national boundaries, and the gains in the use of notice on editions published abroad under the Universal Copyright Convention should not be wiped out. The consequences of omissions or mistakes with respect to the notice are far less serious under the bill than under the present law, and section 405(a) makes doubly clear that a copyright owner may guard himself against errors or omissions by others if he makes use of the prescribed notice an express condition of his publishing licenses.

Subsection (b) of section 401, which sets out the form of notice to appear on visually-perceptible copies, retains the basic elements of the notice under the present law: the word "Copyright", the abbreviation "Copr.", or the symbol "©"; the year of first publication; and the name of the copyright owner. The year of publication, which is still significant in computing the term and determining the status of a work, is required for all categories of copyrightable works. Clause (2) of subsection (b) makes clear that, in the case of a derivative work or compilation, it is not necessary to list the dates of publication of all preexisting material incorporated in the work; however, as noted below in connection with section 409, the application for registration covering a compilation or derivative work must identify "any preexisting work or works that it is based on or incorporates." Clause (3) establishes that a recognizable abbreviation or a generally known alternative designation may be used instead of the full name of the copyright owner.

By providing simply that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright," subsection (c) follows the flexible approach of the Universal Copyright Convention. The further provision empowering the Register of Copyrights to set forth in regulations a list of examples of "specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement" will offer substantial guidance and avoid a good deal of uncertainty. A notice placed or affixed in accordance with the regulations would clearly meet the requirements but, since the Register's specifications are not to "be considered exhaustive," a notice placed or affixed in some other way might also comply with the law if it were found to "give reasonable notice" of the copyright claim.

COMPLIANCE WITH PREDECESSOR NOTICE PROVISIONS; COPIES DISTRIBUTED AFTER DEC. 31, 1977

Section 108 of Pub. L. 94-553 provided that: "The notice provisions of sections 401 through 403 of title 17 as amended by the first section of this Act [sections 401 through 403 of this title] apply to all copies or phonorecords publicly distributed on or after January 1, 1978. However, in the case of a work published

before January 1, 1978, compliance with the notice provisions of title 17 either as it existed on December 31, 1977, or as amended by the first section of this Act, is adequate with respect to copies publicly distributed after December 31, 1977."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 403 to 405 of this title.

**§ 402. Notice of copyright: Phonorecords of sound recordings**

**(a) General requirement**

Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed phonorecords of the sound recording.

**(b) Form of notice**

The notice appearing on the phonorecords shall consist of the following three elements:

(1) the symbol ℗ (the letter P in a circle); and

(2) the year of first publication of the sound recording; and

(3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

**(c) Position of notice**

The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2577.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 403 to 405 of this title.

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

A special notice requirement, applicable only to the subject matter of sound recordings, is established by section 402. Since the bill protects sound recordings as separate works, independent of protection for any literary or musical works embodied in them, there would be a likelihood of confusion if the same notice requirements applied to sound recordings and to the works they incorporate. Like the present law, therefore, section 402 thus sets forth requirements for a notice to appear on the "phonorecords" of "sound recordings" that are different from the notice requirements established by section 401 for the "copies" of all other types of copyrightable works. Since "phonorecords" are not "copies," there is no need to place a section 401 notice on "phonorecords" to protect the literary or musical works embodied in the records.

In general, the form of the notice specified by section 402(b) consists of the symbol "℗"; the year of first publication of the sound recording; and the name of the copyright owner or an admissible variant. Where the record producer's name appears on the record label, album, sleeve, jacket, or other container, it will be considered a part of the notice if no other name appears in conjunction with it. Under subsection (c), the notice for a copyrighted sound recording may be affixed to the surface, label, or container of the phonorecord "in such manner and location as to give reasonable notice of the claim of copyright."

There are at least three reasons for prescribing use of the symbol "℗" rather than "©" in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner notes, et cetera. The symbol "℗" has also been adopted as the international symbol for the protection of sound recordings by the "Phonograms Convention" (the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva October 29, 1971), to which the United States is a party.

**§ 403. Notice of copyright: Publications incorporating United States Government works**

Whenever a work is published in copies or phonorecords consisting preponderantly of one or more works of the United States Government, the notice of copyright provided by sections 401 or 402 shall also include a statement identifying, either affirmatively or negatively, those portions of the copies or phonorecords embodying any work or works protected under this title.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2577.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Section 403 is aimed at a publishing practice that, while technically justified under the present law, has been the object of considerable criticism. In cases where a Government work is published or republished commercially, it has frequently been the practice to add some "new matter" in the form of an introduction, editing, illustrations, etc., and to include a general copyright notice in the name of the commercial publisher. This in no way suggests to the public that the bulk of the work is uncopyrightable and therefore free for use.

To make the notice meaningful rather than misleading, section 403 requires that, when the copies or phonorecords consist "preponderantly of one or more works of the United States Government," the copyright notice (if any) identify those parts of the work in which copyright is claimed. A failure to meet this requirement would be treated as an omission of the notice, subject to the provisions of section 405.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 404, 405 of this title.

**§ 404. Notice of copyright: Contributions to collective works**

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 401 through 403. However, a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 401 through 403 with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in

the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) Where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 406(a).

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2577.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

In conjunction with the provisions of section 201(c), section 404 deals with a troublesome problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of the section is threefold:

(1) To permit but not require a separate contribution to bear its own notice;

(2) To make a single notice, covering the collective work as a whole, sufficient to satisfy the notice requirement for the separate contributions it contains, even if they have been previously published or their ownership is different; and

(3) To protect the interests of an innocent infringer of copyright in a contribution that does not bear its own notice, who has dealt in good faith with the person named in the notice covering the collective work as a whole.

As a general rule, under this section, the rights in an individual contribution to a collective work would not be affected by the lack of a separate copyright notice, as long as the collective work as a whole bears a notice. One exception to this rule would apply to "advertisements inserted on behalf of persons other than the owner of copyright in the collective work." Collective works, notably newspapers and magazines, are major advertising media, and it is common for the same advertisement to be published in a number of different periodicals. The general copyright notice in a particular issue would not ordinarily protect the advertisements inserted in it, and relatively little advertising matter today is published with a separate copyright notice. The exception in section 404(a), under which separate notices would be required for most advertisements published in collective works, would impose no undue burdens on copyright owners and is justified by the special circumstances.

Under section 404(b) a separate contribution that does not bear its own notice, and that is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, is treated as if it has been published with the wrong name in the notice. The case is governed by section 406(a), which means that an innocent infringer who in good faith took a license from the person named in the general notice would be shielded from liability to some extent.

### § 405. Notice of copyright: Omission of notice

#### (a) Effect of omission on copyright

The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or

(3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

#### (b) Effect of omission on innocent infringers

Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition or permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

#### (c) Removal of notice

Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2578.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

**Effect of Omission on Copyright Protection.** The provisions of section 405(a) make clear that the notice requirements of sections 401, 402, and 403 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Under the proposed law a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.

Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely. Subsection (a) of section 405 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

(1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or

(2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Thus, if notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

Section 405(a) takes a middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Clause (1) provides that, as long as the omission is from "no more than a relatively small number of copies or phonorecords," there is no effect upon the copyright owner's rights except in the case of an innocent infringement covered by section 405(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase "relatively small number" is intended to be less restrictive than the phrase "a particular copy or copies" now in section 21 of the present law [section 21 of former title 21].

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and the 5-year period is reasonable and consistent with the period provided in section 410(c).

The second condition established by clause (2) is that the copyright owner make a "reasonable effort," after discovering his error, to add the notice to copies or phonorecords distributed thereafter. This condition is specifically limited to copies or phonorecords publicly distributed in the United States, since it would be burdensome and impractical to require an American copyright owner to police the activities of foreign licensees in this situation.

The basic notice requirements set forth in sections 401(a) and 402(a) are limited to cases where a work is published "by authority of the copyright owner" and, in prescribing the effect of omission of notice, section 405(a) refers only to omission "from copies or phonorecords publicly distributed by authority of the copyright owner." The intention behind this language is that, where the copyright owner authorized publication of the work, the notice requirements would not be met if copies or phonorecords are publicly distributed without a notice, even if he expected a notice to be used. However, if the copyright owner authorized publication only on the express condition that all copies or phonorecords bear a prescribed notice, the provisions of section 401 or 402 and of section 405 would not apply since the publication itself would not be authorized. This principle is stated directly in section 405(a)(3).

**Effect of Omission on Innocent Infringers.** In addition to the possibility that copyright protection will be forfeited under section 405(a)(2) if the notice is omitted, a second major inducement to use of the notice is found in subsection (b) of section 405. That provision, which limits the rights of a copyright owner against innocent infringers under certain circumstances, would be applicable whether the notice has been omitted from a large number or from a "relatively small number" of copies. The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.

Under section 405(b) an innocent infringer who acts "in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted", and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to "any infringing acts committed before receiving actual notice" of registration. Thus, where the infringement is completed before actual notice has been served—as would be the usual case with respect to relatively minor infringements by teachers, librarians, journalists, and the like—liability, if any, would be limited to the profits the infringer realized from the act of infringement. On the other hand, where the infringing enterprise is one running over a period of time, the copyright owner would be able to seek an injunction against continuation of the infringement, and to obtain full monetary recovery for all infringing acts committed after he had served notice of registration. Persons who undertake major enterprises of this sort should check the Copyright Office registration records before starting, even where copies have been published without notice.

The purpose of the second sentence of subsection (b) is to give the courts broad discretion to balance the equities within the framework of section 405 [this section]. Where an infringer made profits from infringing acts committed innocently before receiving notice from the copyright owner, the court may allow or withhold their recovery in light of the circumstances. The court may enjoin an infringement or may permit its continuation on condition that the copyright owner be paid a reasonable license fee.

**Removal of Notice by Others.** Subsection (c) of section 405 involves the situation arising when, following an authorized publication with notice, someone further down the chain of commerce removes, destroys, or obliterates the notice. The courts dealing with this problem under the present law, especially in connection with copyright notices on the selvage of textile fabrics, have generally upheld the validity of a notice that was securely attached to the copies when they left the control of the copyright owner, even though removal of the notice at some later stage was likely. This conclusion is incorporated in subsection (c).

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 406, 408 of this title.

**§ 406. Notice of copyright: Error in name or date**

**(a) Error in name**

Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright are not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if such person proves that he or she was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun—

(1) registration for the work had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded.

The person named in the notice is liable to account to the copyright owner for all receipts from transfers or licenses purportedly made under the copyright by the person named in the notice.

**(b) Error in date**

When the year date in the notice on copies or phonorecords distributed by authority of the copyright owner is earlier than the year in which publication first occurred, any period

computed from the year of first publication under section 302 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 405.

**(c) Omission of name or date**

Where copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 405.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2578.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

In addition to cases where notice has been omitted entirely, it is common under the present law for a copyright notice to be fatally defective because the name or date has been omitted or wrongly stated. Section 406 is intended to avoid technical forfeitures in these cases, while at the same time inducing use of the correct name and date and protecting users who rely on erroneous information.

**Error in Name.** Section 406(a) begins with a statement that the use of the wrong name in the notice will not affect the validity or ownership of the copyright, and then deals with situations where someone acting innocently and in good faith infringes a copyright by relying on a purported transfer or license from the person erroneously named in the notice. In such a case the innocent infringer is given a complete defense unless a search of the Copyright Office records would have shown that the owner was someone other than the person named in the notice. Use of the wrong name in the notice is no defense if, at the time infringement was begun, registration had been made in the name of the true owner, or if "a document executed by the person named in the notice and showing the ownership of the copyright had been recorded."

The situation dealt with in section 406(a) presupposes a contractual relation between the copyright owner and the person named in the notice. The copies or phonorecords bearing the defective notice have been "distributed by authority of the copyright owner" and, unless the publication can be considered unauthorized because of breach of an express condition in the contract or other reasons, the owner must be presumed to have acquiesced in the use of the wrong name. If the person named in the notice grants a license for use of the work in good faith or under a misapprehension, that person should not be liable as a copyright infringer, but the last sentence of section 406(a) would make the person named in the notice liable to account to the copyright owner for "all receipts, from transfers or licenses purportedly made under the copyright" by that person.

**Error in Date.** The familiar problems of antedated and postdated notices are dealt with in subsection (b) of section 406. In the case of an antedated notice, where the year in the notice is earlier than the year of first publication, the bill adopts the established judicial principle that any statutory term measured from the year of publication will be computed from the year given in the notice. This provision would apply not only to the copyright terms of anonymous works, pseudonymous works, and works made for hire under section 302(c), but also to the presumptive periods set forth in section 302(e).

As for postdated notices, subsection (b) provides that, where the year in the notice is more than one year later than the year of first publication the case is treated as if the notice had been omitted and is governed by section 405. Notices postdated by one year are quite common on works published near the end of a year, and it would be unnecessarily strict to equate cases of that sort with works published without notice of any sort.

**Omission of Name or Date.** Section 406(c) provides that, if the copies or phonorecords "contain no name or no date that could reasonably be considered a part of the notice," the result is the same as if the notice had been omitted entirely, and section 405 controls. Unlike the present law, the bill contains no provision requiring the elements of the copyright notice to "accompany" each other, and under section 406(c) a name or date that could reasonably be read with the other elements may satisfy the requirements even if somewhat separated from them. Direct contiguity or juxtaposition of the elements is no longer necessary; but if the elements are too widely separated for their relation to be apparent, or if uncertainty is created by the presence of other names or dates, the case would have to be treated as if the name or date, and hence the notice itself had been omitted altogether.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 404 of this title.

### § 407. Deposit of copies or phonorecords for Library of Congress

(a) Except as provided by subsection (c), and subject to the provisions of subsection (e), the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication—

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords.

Neither the deposit requirements of this subsection nor the acquisition provisions of subsection (e) are conditions of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories. Such regulations shall provide either for complete exemption from the deposit requirements of this section, or for alternative forms of deposit aimed at providing a satisfactory archival record of a work without imposing practical or financial hardships on the depositor, where the individual author is the owner of copyright in a pictorial, graphic, or sculptural work and (i) less than five copies of the work have been published, or (ii) the work has been published in a limited edition consisting of numbered copies, the monetary value of which would make the mandatory deposit of two copies of the best edition of the work burdensome, unfair, or unreasonable.

(d) At any time after publication of a work as provided by subsection (a), the Register of

Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable—

(1) to a fine of not more than $250 for each work; and

(2) to pay into a specially designated fund in the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost of the Library of Congress of acquiring them; and

(3) to pay a fine of $2,500, in addition to any fine or liability imposed under clauses (1) and (2), if such person willfully or repeatedly fails or refuses to comply with such a demand.

(e) With respect to transmission programs that have been fixed and transmitted to the public in the United States but have not been published, the Register of Copyrights shall, after consulting with the Librarian of Congress and other interested organizations and officials, establish regulations governing the acquisition, through deposit or otherwise, of copies or phonorecords of such programs for the collections of the Library of Congress.

(1) The Librarian of Congress shall be permitted, under the standards and conditions set forth in such regulations, to make a fixation of a transmission program directly from a transmission to the public, and to reproduce one copy or phonorecord from such fixation for archival purposes.

(2) Such regulations shall also provide standards and procedures by which the Register of Copyrights may make written demand, upon the owner of the right of transmission in the United States, for the deposit of a copy or phonorecord of a specific transmission program. Such deposit may, at the option of the owner of the right of transmission in the United States, be accomplished by gift, by loan for purposes of reproduction, or by sale at a price not to exceed the cost of reproducing and supplying the copy or phonorecord. The regulations established under this clause shall provide reasonable periods of not less than three months for compliance with a demand, and shall allow for extensions of such periods and adjustments in the scope of the demand or the methods for fulfilling it, as reasonably warranted by the circumstances. Willful failure or refusal to comply with the conditions prescribed by such regulations shall subject the owner of the right of transmission in the United States to liability for an amount, not to exceed the cost of reproducing and supplying the copy or phonorecord in question, to be paid into a specially designated fund in the Library of Congress.

(3) Nothing in this subsection shall be construed to require the making or retention, for purposes of deposit, of any copy or phonorecord of an unpublished transmission program, the transmission of which occurs before the receipt of a specific written demand as provided by clause (2).

(4) No activity undertaken in compliance with regulations prescribed under clauses (1) or (2) of this subsection shall result in liability if intended solely to assist in the acquisition of copies or phonorecords under this subsection.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2579.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The provisions of sections 407 through 411 of the bill mark another departure from the present law. Under the 1909 statute, deposit of copies for the collections of the Library of Congress and deposit of copies for purposes of copyright registration have been treated as the same thing. The bill's basic approach is to regard deposit and registration as separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be, and in the bulk of cases undoubtedly will be, combined with copyright registration.

The basic requirement of the deposit provision, section 407, is that within 3 months after a work has been published with notice of copyright in the United States, the "owner of copyright or of the exclusive right of publication" must deposit two copies or phonorecords of the work in the Copyright Office. The Register of Copyrights is authorized to exempt any category of material from the deposit requirements. Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply would be penalized by a fine.

Under the present law deposits for the Library of Congress must be combined with copyright registration, and failure to comply with a formal demand for deposit and registration results in complete loss of copyright. Under section 407 of the bill, the deposit requirements can be satisfied without ever making registration, and subsection (a) makes clear that deposit "is not a condition of copyright protection." A realistic fine, coupled with the increased inducements for voluntary registration and deposit under other sections of the bill, seems likely to produce a more effective deposit system than the present one. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

Although the basic deposit requirements are limited to works "published with notice of copyright in the United States," they would become applicable as soon as a work first published abroad is published in this country through the distribution of copies or phonorecords that are either imported or are part of an American edition. With respect to all types or works other than sound recordings, the basic obligation is to deposit "two complete copies of the best edition"; the term "best edition," as defined in section 101, makes clear the the Library of Congress is entitled to receive copies of phonorecords from the edition it believes best suits its needs regardless of the quantity or quality of other U.S. editions that may also have been published before the time of deposit. Once the deposit requirements for a particular work have been satisfied under section 407, however, the Library cannot claim deposit of future editions unless they represent newly copyrightable works under section 103.

The deposit requirement for sound recordings includes "two complete phonorecords of the best edition" and any other visually-perceptible material published with the phonorecords. The reference here is to the text or pictorial matter appearing on record

sleeves and album covers or embodied in separate leaflets or booklets included in a sleeve, album, or other container. The required deposit in the case of a sound recording would extend to the entire "package" and not just to the disk, tape, or other phonorecord included as part of it.

Deposits under section 407, although made in the Copyright Office, are "for the use or disposition of the Library of Congress." Thus, the fundamental criteria governing regulations issued under section 407(c), which allows exemptions from the deposit requirements for certain categories of works, would be the needs and wants of the Library. The purpose of this provision is to make the deposit requirements as flexible as possible, so that there will be no obligation to make deposits where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases. The regulations, in establishing special categories for these purposes, would necessarily balance the value of the copies or phonorecords to the collections of the Library of Congress against the burdens and costs to the copyright owner of providing them.

The Committee adopted an amendment to subsection (c) of section 407, aimed at meeting the concerns expressed by representatives of various artists' groups concerning the deposit of expensive art works and graphics published in limited editions. Under the present law, optional deposit of photographs is permitted for various classes of works, but not for the fine prints, and this has resulted in many artists choosing to forfeit copyright protection rather than bear the expense of depositing "two copies of the best edition." To avoid this unfair result, the last sentence of subsection (c) would require the Register to issue regulations under which such works would either be exempted entirely from the mandatory deposit or would be subject to an appropriate alternative form of deposit.

If, within three months after the Register of Copyright has made a formal demand for deposit in accordance with section 407(d), the person on whom the demand was made has not complied, that person becomes liable to a fine up to $250 for each work, plus the "total retail price of the copies or phonorecords demanded." If no retail price has been fixed, clause (2) of subsection (d) establishes the additional amount as "the reasonable cost to the Library of Congress of acquiring them." Thus, where the copies or phonorecords are not available for sale through normal trade channels—as would be true of many motion picture films, video tapes, and computer tapes, for example—the item of cost to be included in the fine would be equal to the basic expense of duplicating the copies or phonorecords plus a reasonable amount representing what it would have cost the Library to obtain them under its normal acquisitions procedures, if they had been available.

There have been cases under the present law in which the mandatory deposit provisions have been deliberately and repeatedly ignored, presumably on the assumption that the Library is unlikely to enforce them. In addition to the penalties provided in the current bill, the last clause of subsection (d) would add a fine of $2,500 for willful or repeated failure or refusal to deposit upon demand.

The Committee also amended section 407 [this section] by adding a new subsection (e), with conforming amendments of sections 407(a) and 408(b). These amendments are intended to provide a basis for the Library of Congress to acquire, as a part of the copyright deposit system, copies or recordings of non-syndicated radio and television programs, without imposing any hardships on broadcasters. Under subsection (e) the Library is authorized to tape programs off the air in all cases and may "demand" that the broadcaster supply the Library with a copy or phonorecord of a particular program. However, this "demand" authority is extremely limited: (1) The broadcaster is not required to retain any recording of a program after it has been transmitted unless a demand has already been received; (2) the demand would cover only a particular program; "blanket" demands would not be permitted; (3) the broadcaster would have the option of supplying the demand by gift, by loan for purposes of reproduction, or by sale at cost; and (4) the penalty for willful failure or refusal to comply with a demand is limited to the cost of reproducing and supplying the copy or phonorecord in question.

DEPOSITS AND REGISTRATIONS MADE AFTER DECEMBER 31, 1977, IN RESPONSE TO DEMAND UNDER PREDECESSOR DEMAND AND PENALTY PROVISIONS

Section 110 of Pub. L. 94-553 provided that: "The demand and penalty provisions of section 14 of title 17 as it existed on December 31, 1977, apply to any work in which copyright has been secured by publication with notice of copyright on or before that date, but any deposit and registration made after that date in response to a demand under that section shall be made in accordance with the provisions of title 17 as amended by the first section of this Act."

CROSS REFERENCES

Fee for issuance of a receipt for a deposit, see section 708 of this title.

Jurisdiction of district courts of action or proceeding for recovery or enforcement of fines, see section 1355 of Title 28, Judiciary and Judicial Procedure.

Placement of copies and phonorecords acquired in accordance with this section in American Television and Radio Archives, see section 170 of Title 2, The Congress.

Records of deposits to be kept in Copyright Office, see section 705 of this title.

Retention and deposition of articles deposited in Copyright Office, see section 704 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 408, 704, 708 of this title; title 2 section 170.

### § 408. Copyright registration in general

**(a) Registration permissive**

At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Subject to the provisions of section 405(a), such registration is not a condition of copyright protection.

**(b) Deposit for copyright registration**

Except as provided by subsection (c), the material deposited for registration shall include—

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of a published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Copies or phonorecords deposited for the Library of Congress under section 407 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register

may, by regulation, require. The Register shall also prescribe regulations establishing requirements under which copies or phonorecords acquired for the Library of Congress under subsection (e) of section 407, otherwise than by deposit, may be used to satisfy the deposit provisions of this section.

**(c) Administrative classification and optional deposit**

(1) The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(2) Without prejudice to the general authority provided under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under all of the following conditions—

(A) if each of the works as first published bore a separate copyright notice, and the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner was the same in each notice; and

(B) if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

(C) if the application identifies each work separately, including the periodical containing it and its date of first publication.

(3) As an alternative to separate renewal registrations under subsection (a) of section 304, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, upon the filing of a single application and fee, under all of the following conditions:

(A) the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; and

(B) the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; and

(C) the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after the thirty-first day of December of the calendar year in which all of the works were first published; and

(D) the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

**(d) Corrections and amplifications**

The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided by section 708, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

**(e) Published edition of previously registered work**

Registration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2580.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**Permissive Registration.** Under section 408(a), registration of a claim to copyright in any work whether published or unpublished, can be made voluntarily by "the owner of copyright or of any exclusive right in the work" at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsection (b) and (c), together with an application and fee. Except where, under section 405(a), registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, registration is not a condition of copyright protection.

**Deposit for Purpose of Copyright Registration.** In general, and subject to various exceptions, the material to be deposited for copyright registration consists of one complete copy or phonorecord of an unpublished work, and two complete copies or phonorecords of the best edition in the case of a published work. Section 408(b) provides special deposit requirements in the case of a work first published abroad ("one complete copy or phonorecord as so published") and in the case of a contribution to a collective work ("one complete copy or phonorecord of the best edition of the collective work"). As a general rule the deposit of more than a tear sheet or similar fraction of a collective work is needed to identify the contribution properly and to show the form in which it was published. Where appropriate as in the case of collective works such as multivolume encyclopedias, multipart newspaper editions, and works that are rare or out of print, the regulations issued by the Register under section 408(c) can be expected to make exceptions or special provisions.

With respect to works published in the United States, a single deposit could be used to satisfy the deposit requirements of section 407 and the registration requirements of section 408, if the application and fee for registration are submitted at the same time and are accompanied by "any additional identifying material" required by regulations. To serve this dual purpose the deposit and registration would have to be made simultaneously; if a deposit under section 407 had already been made, an additional deposit would be

required under section 408. In addition, since deposit for the Library of Congress and registration of a claim to copyright serve essentially different functions, section 408(b) authorizes the Register of Copyrights to issue regulations under which deposit of additional material, needed for identification of the work in which copyright is claimed, could be required in certain cases.

**Administrative Classification.** It is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from any classification of copyrightable works for practical administrative purposes. Section 408(c)(1) thus leaves it to the Register of copyrights to specify "the administrative classes into which works are to be placed for puposes of deposit and registration," and makes clear that this administrative classification "has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title."

**Optional Deposit.** Consistent with the principle of administrative flexibility underlying all of the deposit and registration provisions, subsection (c) of section 408 also gives the Register latitude in adjusting the type of material deposited to the needs of the registration system. The Register is authorized to issue regulations specifying "the nature of the copies of phonorecords to be deposited in the various classes" and, for particular classes, to require or permit deposit of identifying material rather than copies or phonorecords, deposit of one copy or phonorecord rather than two, or, in the case of a group of related works, a single rather than a number of separate registrations. Under this provision the Register could, where appropriate, permit deposit of phonorecords rather than notated copies of musical compositions, allow or require deposit of print-outs of computer programs under certain circumstances, or permit deposit of one volume of an encyclopedia for purposes of registration of a single contribution.

Where the copies or phonorecords are bulky, unwieldly, easily broken, or otherwise impractical to file and retain as records identifying the work registered, the Register would be able to require or permit the substitute deposit of material that would better serve the purpose of identification. Cases of this sort might include, for example, billboard posters, toys and dolls, ceramics and glassware, costume jewelry, and a wide range of three-dimensional objects embodying copyrighted material. The Register's authority would also extend to rare or extremely valuable copies which would be burdensome or impossible to deposit. Deposit of one copy or phonorecord rather than two would probably be justifiable in the case of most motion pictures, and in any case where the Library of Congress has no need for the deposit and its only purpose is identification.

The provision empowering the Register to allow a number of related works to be registered together as a group represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expenses on authors and other copyright owners. In a number of cases the technical necessity for separate applications and fees has caused copyright owners to forego copyright altogether. Examples of cases where these undesirable and unnecessary results could be avoided by allowing a single registration include the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.

**Single Registration.** Section 408(c)(2) directs the Register of Copyrights to establish regulations permitting under certain conditions a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee. It is required that each of the works as first published have a separate copyright notice, and that the name of the owner of copyright in the work, (or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner) is the same in each notice. It is further required that the deposit consist of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution is first published. Finally, the application shall identify each work separately, including the periodical containing it and its date of first publication.

Section 408(c)(3) provides under certain conditions an alternative to the separate renewal registrations of subsection (a). If the specified conditions are met, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, upon the filing of a single application and fee. it is required that the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; that the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; that the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after December 31 of the calendar year in which all of the works were first published; and that the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

**Corrections and Amplifications.** Another unsatisfactory aspect of the present law is the lack of any provision for correcting or amplifying the information given in a completed registration. Subsection (d) of section 408 would remedy this by authorizing the Register to establish "formal procedures for the filing of an application for supplementary registration," in order to correct an error or amplify the information in a copyright registration. The "error" to be corrected under subsection (d) is an error by the applicant that the Copyright Office could not have been expected to note during its examination of the claim; where the error in a registration is the result of the Copyright Office's own mistake or oversight, the Office can make the correction on its own initiative and without recourse to the "supplementary registration" procedure.

Under subsection (d), a supplementary registration is subject to payment of a separate fee and would be maintained as an independent record, separate and apart from the record of the earlier registration it is intended to supplement. However, it would be required to identify clearly "the registration to be corrected or amplified" so that the two registrations could be tied together by appropriate means in the Copyright Office records. The original registration would not be expunged or cancelled; as stated in the subsection: "The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration."

**Published Edition of Previously Registered Work.** The present statute requires that, where a work is registered in unpublished form, it must be registered again when it is published, whether or not the published edition contains any new copyrightable material. Under the bill there would be no need to make a second registration for the published edition unless it contains sufficient added material to be considered a "derivative work" or "compilation" under section 103.

On the other hand, there will be a number of cases where the copyright owner, although not required to do so, would like to have registration made for the published edition of the work, especially since the owner will still be obliged to deposit copies of phonorecords of it in the Copyright Office under section 407. From the point of view of the public there are advantages in allowing the owner to do so, since registration

for the published edition will put on record the facts about the work in the form in which it is actually distributed to the public. Accordingly, section 408(e), which is intended to accomplish this result, makes an exception to the general rule against allowing more than one registration for the same work.

CROSS REFERENCES

Fee for registration of copyright claim or supplementary registration, see section 708 of this title.

Forms and procedures, reproduction for use of the blind and physically handicapped, see section 710 of this title.

Issuance of importation statement, material not manufactured in United States or Canada, see section 601 of this title.

Placement of copies and phonorecords acquired in accordance with this section in American Television and Radio Archives, see section 170 of Title 2, The Congress.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 302, 405, 601, 704, 708, 710 of this title; title 2 section 170.

**§ 409. Application for copyright registration**

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include—

(1) the name and address of the copyright claimant;

(2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths;

(3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;

(4) in the case of a work made for hire, a statement to this effect;

(5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;

(6) the title of the work, together with any previous or alternative titles under which the work can be identified;

(7) the year in which creation of the work was completed;

(8) if the work has been published, the date and nation of its first publication;

(9) in the case of a compilation or derivative work, an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered;

(10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in the United States, the names of the persons or organizations who performed the processes specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed; and

(11) any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2582.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The various clauses of section 409, which specify the information to be included in an application for copyright registration, are intended to give the Register of Copyrights authority to elicit all of the information needed to examine the application and to make a meaningful record of registration. The list of enumerated items was not exhaustive; under the last clause of the section the application may also include "any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright."

Among the enumerated items there are several that are not now included in the Copyright Office's application forms, but will become significant under the life-plus-50 term and other provisions of the bill. Clause (5), reflecting the increased importance of the interrelationship between registration of copyright claims and recordation of transfers of ownership, requires a statement of how a claimant who is not the author acquired ownership of the copyright. Clause (9) requires that, "in the case of a compilation or derivative work" the application include "an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered." It is intended that, under this requirement, the application covering a collection such as a song-book or hymnal would clearly reveal any works in the collection that are in the public domain, and the copyright status of all other previously-published compositions. This information will be readily available in the Copyright Office.

The catch-all clause at the end of the section will enable the Register to obtain more specialized information, such as that bearing on whether the work contains material that is a "work of the United States Government." In the case of works subject to the manufacturing requirement, the application must also include information about the manufacture of the copies.

CROSS REFERENCES

Penalty for false representation of material fact, see section 506 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 408, 506 of this title.

**§ 410. Registration of claim and issuance of certificate**

(a) When, after examination, the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that, in accordance with the provisions of this title, the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration and shall notify the applicant in writing of the reasons for such refusal.

(c) In any judicial proceedings the certificate of a registration made before or within five

years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2582.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

The first two subsections of section 410 set forth the two basic duties of the Register of Copyrights with respect to copyright registration: (1) to register the claim and issue a certificate if the Register determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met," and (2) to refuse registration and notify the applicant if the Register determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Subsection (c) deals with the probative effect of a certificate of registration issued by the Register under subsection (a). Under its provisions, a certificate is required to be given prima facie weight in any judicial proceedings if the registration it covers was made "before or within five years after first publication of the work"; thereafter the court is given discretion to decide what evidentiary weight the certificate should be accorded. This five-year period is based on a recognition that the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate.

Under section 410(c), a certificate is to "constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." The principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions, and it is a sound one. It is true that, unlike a patent claim, a claim to copyright is not examined for basic validity before a certificate is issued. On the other hand, endowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of the copyright does not deprive the defendant in an infringement suit of any rights, it merely orders the burdens of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underline the validity of the copyright unless the defendant, by effectively challenging them, shifts the burden of doing so to the plaintiff.

Section 410(d), which is in accord with the present practice of the Copyright Office, makes the effective date of registration the day when an application, deposit, and fee "which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration" have all been received. Where the three necessary elements are received at different times the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim. The provision not only takes account of the inevitable timelag between receipt of the application and other material and the issuance of the certificate, but it also recognizes the possibility that a court might later find the Register wrong in refusing registration.

REGISTRATION OF CLAIMS TO COPYRIGHTS AND RECORDATION OF ASSIGNMENTS OF COPYRIGHTS AND OTHER INSTRUMENTS UNDER PREDECESSOR PROVISIONS

Section 109 of Pub. L. 94–553 provided that: "The registration of claims to copyright for which the required deposit, application, and fee were received in the Copyright Office before January 1, 1978, and the recordation of assignments of copyright or other instruments received in the Copyright Office before January 1, 1978, shall be made in accordance with title 17 as it existed on December 31, 1977."

FEDERAL RULES OF EVIDENCE

Self-authentication, domestic public documents under seal, see rule 902, Title 28, Appendix, Judiciary and Judicial Procedure.

CROSS REFERENCES

Deduction in refund in case involving refusal to register a claim, see section 708 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 708 of this title.

### § 411. Registration as prerequisite to infringement suit

(a) Subject to the provisions of subsection (b), no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

(b) In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if, in accordance with requirements that the Register of Copyrights shall prescribe by regulation, the copyright owner—

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and

(2) makes registration for the work within three months after its first transmission.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2583.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

The first sentence of section 411(a) restates the present statutory requirement that registration must be

made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration.

The second and third sentences of section 411(a) would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F.2d 637 (2d Cir. 1958). That case requires an applicant, who has sought registration and has been refused, to bring an action against the Register of Copyrights to compel the issuance of a certificate, before suit can be brought against an infringer. Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights. The Register is authorized, though not required, to enter the suit within 60 days; the Register would be a party on the issue of registrability only, and a failure by the Register to join the action would "not deprive the court of jurisdiction to determine that issue."

Section 411(b) is intended to deal with the special situation presented by works that are being transmitted "live" at the same time they are being fixed in tangible form for the first time. under certain circumstances, where the infringer has been given advance notice, an injunction could be obtained to prevent the unauthorized use of the material included in the "live" transmission.

CROSS REFERENCES

Infringement actions, see section 501 et seq. of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 412, 501 of this title.

### § 412. Registration as prerequisite to certain remedies for infringement

In any action under this title, other than an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2583.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The need for section 412 arises from two basic changes the bill will make in the present law.

(1) Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way.

(2) The great body of unpublished works now protected at common law would automatically be brought under copyright and given statutory protection. The remedies for infringement presently available at common law should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.

Under the general scheme of the bill, a copyright owner whose work has been infringed before registration would be entitled to the remedies ordinarily available in infringement cases: an injunction on terms the court considers fair, and his actual damages plus any applicable profits not used as a measure of damages. However, section 412 would deny any award of the special or "extraordinary" remedies of statutory damages or attorney's fees where infringement of copyright in an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration (unless registration has been made within a grace period of three months after publication). These provisions would be applicable to works of foreign and domestic origin alike.

In providing that statutory damages and attorney's fees are not recoverable for infringement of unpublished, unregistered works, clause (1) of section 412 in no way narrows the remedies available under the present law. With respect to published works, clause (2) would generally deny an award of those two special remedies where infringement takes place before registration. As an exception, however, the clause provides a grace period of three months after publication during which registration can be made without loss of remedies; full remedies could be recovered for any infringement begun during the three months after publication if registration is made before that period has ended. This exception is needed to take care of newsworthy or suddenly popular works which may be infringed almost as soon as they are published, before the copyright owner has had a reasonable opportunity to register his claim.

## CHAPTER 5—COPYRIGHT INFRINGEMENT AND REMEDIES

Sec.
501. Infringement of copyright.
502. Remedies for infringement: Injunctions.
503. Remedies for infringement: Impounding and disposition of infringing articles.
504. Remedies for infringement: Damage and profits.
505. Remedies for infringement: Costs and attorney's fees.
506. Criminal offenses.
507. Limitations on actions.
508. Notification of filing and determination of actions.
509. Seizure and forfeiture.
510. Remedies for alteration of programing by cable systems.

### § 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2584.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The bill, unlike the present law, contains a general statement of what constitutes infringement of copyright. Section 501(a) identifies a copyright infringer as someone who "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118" of the bill, or who imports copies or phonorecords in violation of section 602. Under the latter section an unauthorized importation of copies or phonorecords acquired abroad is an infringement of the exclusive right of distribution under certain circumstances.

The principle of the divisibility of copyright ownership, established by section 201(d), carries with it the need in infringement actions to safeguard the rights of all copyright owners and to avoid a multiplicity of suits. Subsection (b) of section 501 enables the owner of a particular right to bring an infringement action in that owner's name alone, while at the same time insuring to the extent possible that the other owners whose rights may be affected are notified and given a chance to join the action.

The first sentence of subsection (b) empowers the "legal or beneficial owner of an exclusive right" to bring suit for "any infringement of that particular right committed while he or she is the owner of it." A "beneficial owner" for this purpose would include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.

The second and third sentences of section 501(b), which supplement the provisions of the Federal Rules of Civil Procedure [Title 28, Judiciary and Judicial Procedure], give the courts discretion to require the plaintiff to serve notice of the plaintiff's suit on "any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright"; where a person's interest "is likely to be affected by a decision in the case" a court order requiring service of notice is mandatory. As under the Federal rules, the court has discretion to require joinder of "any person having or claiming an interest in the copyright"; but, if any such person wishes to become a party, the court must permit that person's intervention.

In addition to cases involving divisibility of ownership in the same version of a work, section 501(b) is intended to allow a court to permit or compel joinder of the owners of rights in works upon which a derivative work is based.

Section 501 contains two provisions conferring standing to sue under the statue upon broadcast stations in specific situations involving secondary transmissions by cable systems. Under subsection (c), a local television broadcaster licensed to transmit a work can sue a cable system importing the same version of the work into the broadcaster's local service area in violation of section 111(c). Subsection (d) deals with cases arising under section 111(c)(3), the provision dealing with substitution or alteration by a cable system of commercials or other programming; in such cases standing to sue is also conferred on: (1) the primary transmitter whose transmission has been altered by the cable system, and (2) any broadcast stations within whose local service area the secondary transmission occurs. These provisions are linked to section 509, a new provision on remedies for alteration of programming by cable systems, discussed below.

**Vicarious Liability for Infringing Performances.** The committee has considered and rejected an amendment to this section intended to exempt the proprietors of an establishment, such as a ballroom or night club, from liability for copyright infringement committed by an independent contractor, such as an orchestra leader. A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers. To be held a related or vicarious infringer in the case of performing rights, a defendent must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commerical gain from the operation and either direct or indirect benefit from the infringing performance. The committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right.

CAUSES OF ACTION ARISING UNDER PREDECESSOR PROVISIONS

Section 112 of Pub. L. 94-553 provided that: "All causes of action that arose under title 17 before January 1, 1978, shall be governed by title 17 as it existed when the cause of action arose."

FEDERAL RULES OF CIVIL PROCEDURE

Application of Rules, see rule 81, Title 28, Appendix, Judiciary and Judicial Procedure.

FEDERAL FORMS OF CIVIL PROCEDURE

Form of complaint for injunction and damages, see form 17, Title 28, Appendix, Judiciary and Judicial Procedure.

CROSS REFERENCES

Acts of infringement—
Making and distributing phonorecords, see section 115 of this title.
Public performances, see section 116 of this title.
Secondary transmission of primary transmission, see section 111 of this title.

Exclusive jurisdiction of district courts of actions arising under copyright laws, see section 1338 of Title 28, Judiciary and Judicial Procedure.

Importation of copies or phonorecords without authority, see section 602 of this title.

Power of the Congress to regulate copyrights, see Const. Art. I, § 8, cl. 8.

Registration as prerequisite to infringement action and to certain remedies for infringement, see sections 411, 412 of this title.

United States as infringer, action in Court of Claims, see section 1498 of Title 28, Judiciary and Judicial Procedure.

Venue in copyright actions, see section 1400 of Title 28.

Works consisting of sounds, images, or both, the first fixation of which is made sumultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 116, 411, 510, 602 of this title.

**§ 502. Remedies for infringement: Injunctions**

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in such clerk's office.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2584.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 502(a) [subsec. (a) of this section] reasserts the discretionary power of courts to grant injunctions and restraining orders, whether "preliminary," "temporary," "interlocutory," "permanent," or "final," to prevent or stop infringements of copyright. This power is made subject to the provisions of section 1498 of title 28 dealing with infringement actions against the United States. The latter reference in section 502(a) makes it clear that the bill would not permit the granting of an unjunction against an infringement for which the Federal Government is liable under section 1498.

Under subsection (b), which is the counterpart of provisions in sections 112 and 113 of the present statute [sections 112 and 113 of former title 17], a copyright owner who has obtained an injunction in one State will be able to enforce it against a defendant located anywhere else in the United States.

FEDERAL RULES OF CIVIL PROCEDURE

Injunctions, generally, see rule 65, Title 28, Appendix, Judiciary and Judicial Procedure.

Security—

Upon granting injunction pending appeal, see rule 62.

Upon granting preliminary injunction, see rule 65.

Territorial extent of effective service of process, see rule 4.

FEDERAL FORMS OF CIVIL PROCEDURE

Form of complaint for injunction and damages, see form 17, Title 28, Appendix, Judiciary and Judicial Procedure.

CROSS REFERENCES

Acts of infringement—

Making and distributing phonorecords, see section 115 of this title.

Public performances, see section 116 of this title.

Secondary transmission of primary transmission, see section 111 of this title.

Power of court to punish for contempt for disobedience to decrees or orders, see section 401 of Title 18, Crimes and Criminal Procedure.

Works consisting of sounds, image, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 116, 411, 510 of this title.

**§ 503. Remedies for infringement: Impounding and disposition of infringing articles**

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2585.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

The two subsections of section 503 deal respectively with the courts' power to impound allegedly infringing articles during the time an action is pending, and to order the destruction or other disposition of articles found to be infringing. In both cases the articles affected include "all copies or phonorecords" which are claimed or found "to have been made or used in violation of the copyright owner's exclusive rights," and also "all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies of phonorecords may be reproduced." The alternative phrase "made or used" in both subsections enables a court to deal as it sees fit with articles which, though reproduced and acquired lawfully, have been used for infringing purposes such as rentals, performances, and displays.

Articles may be impounded under subsection (a) "at any time while an action under this title is pending," thus permitting seizures of articles alleged to be infringing as soon as suit has been filed and without waiting for an injunction. The same subsection empowers the court to order impounding "on such terms as it may deem reasonable." The present Supreme Court rules with respect to seizure and impounding were issued even though there is no specific provision authorizing them in the copyright statute, and there appears no need for including a special provision on the point in the bill.

Under section 101(d) of the present statute [section 101(d) of former title 17], articles found to be infringing may be ordered to be delivered up for destruction. Section 503(b) of the bill would make this provision more flexible by giving the court discretion to order "destruction or other reasonable disposition" of the articles found to be infringing. Thus, as part of its final judgment or decree, the court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice.

CROSS REFERENCES

Acts of infringement—

Making and distributing phonorecords, see section 115 of this title.

Public performances, see section 116 of this title.
Secondary transmission of primary transmission, see section 111 of this title.
Works consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 116, 411, 510 of this title.

**§ 504. Remedies for infringement: Damages and profits**

**(a) In general**

Except as otherwise provided by this title, an infringer of copyright is liable for either—

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

**(b) Actual damages and profits**

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

**(c) Statutory damages**

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $250 or more than $10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2585.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

**In General.** A cornerstone of the remedies sections and of the bill as a whole is section 504, the provision dealing with recovery of actual damages, profits, and statutory damages. The two basic aims of this section are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.

Subsection (a) lays the groundwork for the more detailed provisions of the section by establishing the liability of a copyright infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits under section 504(b) or of statutory damages under section 504(c) is alternative and for the copyright owner to elect; as under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c).

**Actual Damages and Profits.** In allowing the plaintiff to recover "the actual damages suffered by him or her as a result of the infringement," plus any of the infringer's profits "that are attributable to the infringement and are not taken into account in computing the actual damages," section 504(b) recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

The language of the subsection makes clear that only those profits "attributable to the infringement" are recoverable; where some of the defendant's profits result from the infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenue," and the defendant must prove not only "his or her deductible expenses" but also "the element of profit attributable to factors other than the copyrighted work."

**Statutory Damages.** Subsection (c) of section 504 makes clear that the plaintiff's election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment. The remainder of clause (1) of the subsection represents a statement of the general rates applicable to awards of statutory damages. Its principal provisions may be summarized as follows:

1. As a general rule, where the plaintiff elects to recover statutory damages, the court is obliged to award between $250 and $10,000. It can exercise discretion in awarding an amount within that range but, unless one of the exceptions provided by clause (2) is applicable, it cannot make an award of less than $250 or of more than $10,000 if the copyright owner has chosen recovery under section 504(c).

2. Although, as explained below, an award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved in the suit, a single award in the $250 to $10,000 range is to be made "for all infringements involved in the action." A single infringer of a single work is liable for a single amount between $250 and $10,000, no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least $750 and may be awarded up to $30,000. Subsection (c)(1) makes clear, however, that, although they are regarded as independent works for other purposes, "all the parts of a compilation or derivative work constitute one work" for this purpose. Moreover, although the minimum and maximum amounts are to be multiplied where multiple "works" are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate "copyrights" in a single "work" infringed by one act of a defendant.

4. Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for an amount in the $250 to $10,000 range. However, where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.

Clause (2) of section 504(c) provides for exceptional cases in which the maximum award of statutory damages could be raised from $10,000 to $50,000, and in which the minimum recovery could be reduced from $250 to $100. The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent. The language of the clause makes clear that in these situations the burden of proving willfulness rests on the copyright owner and that of proving innocence rests on the infringer, and that the court must make a finding of either willfulness or innocence in order to award the exceptional amounts.

The "innocent infringer" provision of section 504(c)(2) has been the subject of extensive discussion. The exception, which would allow reduction of minimum statutory damages to $100 where the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit. On the other hand, by establishing a realistic floor for liability, the provision preserves its intended deterrent effect; and it would not allow an infringer to escape simply because the plaintiff failed to disprove the defendant's claim of innocence.

In addition to the general "innocent infringer" provision clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504(c)(2) provides that, where such a person or institution infringed copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff.

### Cross References

Acts of infringement—
Making and distributing phonorecords, see section 115 of this title.
Public performances, see section 116 of this title.
Secondary transmission of primary transmission, see section 111 of this title.
Registration as prerequisite for award of statutory damages, see section 412 of this title.
Works consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 111, 115, 116, 405, 411, 412, 510 of this title; title 28 section 1498.

## § 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2586.)

### Historical and Revision Notes

#### HOUSE REPORT NO. 94-1476

Under section 505 the awarding of costs and attorney's fees are left to the court's discretion, and the section also makes clear that neither costs nor attorney's fees can be awarded to or against "the United States or an officer thereof."

### Cross References

Acts of infringement—
Making and distributing phonorecords, see section 115 of this title.
Public performances, see section 116 of this title.
Secondary transmission of primary transmission, see section 111 of this title.
Costs against United States generally, see section 2412 of Title 28, Judiciary and Judicial Procedure, and rule 54 of Federal Rules of Civil Procedure, Title 28, Appendix.
Registration as prerequisite for award of attorney fees, see section 412 of this title.
Taxation of costs, see section 1920 of Title 28, Judiciary and Judicial Procedure.
Works consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 116, 411, 412, 510 of this title.

**§ 506. Criminal offenses**

**(a) Criminal infringement**

Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: *Provided, however,* That any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1), (2), or (3) of section 106 or the copyright in a motion picture afforded by subsections (1), (3), or (4) of section 106 shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense.

**(b) Forfeiture and destruction**

When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

**(c) Fraudulent copyright notice**

Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than $2,500.

**(d) Fraudulent removal of copyright notice**

Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.

**(e) False representation**

Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2586.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Four types of criminal offenses actionable under the bill are listed in section 506: willful infringement for profit, fraudulent use of a copyright notice, fraudulent removal of notice, and false representation in connection with a copyright application. The maximum fine on conviction has been increased to $10,000 and, in conformity with the general pattern of the Criminal Code (18 U.S.C.), no minimum fines have been provided. In addition to or instead of a fine, conviction for criminal infringement under section 506(a) can carry with it a sentence of imprisonment of up to one year. Section 506(b) deals with seizure, forfeiture, and destruction of material involved in cases of criminal infringement.

Section 506(a) contains a special provision applying to any person who infringes willfully and for purposes of commercial advantage the copyright in a sound recording or a motion picture. For the first such offense a person shall be fined not more than $25,000 or imprisoned for not more than one year, or both. For any subsequent offense a person shall be fined not more than $50,000 or imprisoned not more than two years, or both.

CROSS REFERENCES

Acts of infringement subject to this section—
Making and distributing phonorecords, see section 115 of this title.
Public performances, see section 116 of this title.
Secondary transmission of primary transmission, see section 111 of this title.

Costs or prosecution taxable in non-capital proceedings, see section 1918 of Title 28, Judiciary and Judicial Procedure.

Felony and misdemeanor defined, see section 1 of Title 18, Crimes and Criminal Procedure.

Works consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 116, 411, 509 of this title.

**§ 507. Limitations on actions**

**(a) Criminal proceedings**

No criminal proceeding shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.

**(b) Civil actions**

No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2586.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 507, which is substantially identical with section 115 of the present law [section 115 of former title 17], establishes a three-year statute of limitations for both criminal proceedings and civil actions. The language of this section, which was adopted by the act of September 7, 1957 (71 Stat. 633) [Pub. L. 85-313, § 1, Sept. 7, 1957, 71 Stat. 633], represents a reconciliation of views, and has therefore been left unaltered.

CROSS REFERENCES

Limitation on prosecution, trial, or punishment of non-capital offenses generally, see section 3282 of Title 18, Crimes and Criminal Procedure.

**§ 508. Notification of filing and determination of actions**

(a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other copyrighted work is later included in the

action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.

(b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending with the notification a copy of the order or judgment together with the written opinion, if any, of the court.

(c) Upon receiving the notifications specified in this section, the Register shall make them a part of the public records of the Copyright Office.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2586.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 508, which corresponds to some extent with a provision in the patent law (35 U.S.C. 290), is intended to establish a method for notifying the Copyright Office and the public of the filing and disposition of copyright cases. The clerks of the Federal courts are to notify the Copyright Office of the filing of any copyright actions and of their final disposition, and the Copyright Office is to make these notifications a part of its public records.

**§ 509. Seizure and forfeiture**

(a) All copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a), and all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced, and all electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies or phonorecords may be seized and forfeited to the United States.

(b) The applicable procedures relating to (i) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19, (ii) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (iii) the remission or mitigation of such forfeiture, (iv) the compromise of claims, and (v) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon any officer or employee of the Treasury Department or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise; [1] and baggage under the provisions of the customs laws contained in title 19 shall be performed with respect to seizure and forfeiture of all articles described in subsection (a) by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2587.)

[1] So in original. The semicolon probably should be a comma.

CROSS REFERENCES

Acts of infringement subject to this section—
Making and distributing phonorecords, see section 115 of this title.
Public performances, see section 116 of this title.
Secondary transmission of primary transmission, see section 111 of this title.

Transportation, sale or receipt of phonograph records bearing forged or counterfeit labels, see section 2318 of Title 18, Crimes and Criminal Procedure.

Works consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 115, 116, 411 of this title; title 18 section 2318.

**§ 510. Remedies for alteration of programing by cable systems**

(a) In any action filed pursuant to section 111(c)(3), the following remedies shall be available:

(1) Where an action is brought by a party identified in subsections (b) or (c) of section 501, the remedies provided by sections 502 through 505, and the remedy provided by subsection (b) of this section; and

(2) When an action is brought by a party identified in subsection (d) of section 501, the remedies provided by sections 502 and 505, together with any actual damages suffered by such party as a result of the infringement, and the remedy provided by subsection (b) of this section.

(b) In any action filed pursuant to section 111(c)(3), the court may decree that, for a period not to exceed thirty days, the cable system shall be deprived of the benefit of a compulsory license for one or more distant signals carried by such cable system.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2587.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Section 509(b) specifies a new discretionary remedy for alteration of programming by cable systems in violation of section 111(c)(3): the court in such cases may decree that, "for a period not to exceed thirty days, the cable system shall be deprived of the benefit of a compulsory license for one or more distant signals carried by such cable system." The term "distant signals" in this provision is intended to have a meaning consistent with the definition of "distant signal equivalent" in section 111.

Under section 509(a), four types of plaintiffs are entitled to bring an action in cases of alteration of programming by cable systems in violation of section 111(c)(3). For regular copyright owners and local broadcaster-licensees, the full battery of remedies for infringement would be available. The two new classes of potential plaintiffs under section 501(d)—the distant-signal transmitter and other local stations—would be limited to the following remedies: (i) discretionary injunctions; (ii) discretionary costs and attorney's fees; (iii) any actual damages the plaintiff can prove were attributable to the act of altering program content; and (iv) the new discretionary remedy of suspension of compulsory licensing.

CROSS REFERENCES

Secondary transmission of primary transmission as subject to this section, see section 111 of this title.

Works consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, as subject to this section, although not yet registered, see section 411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 111, 411 of this title.

## CHAPTER 6—MANUFACTURING REQUIREMENTS AND IMPORTATION

Sec.
601. Manufacture, importation, and public distribution of certain copies.
602. Infringing importation of copies or phonorecords.
603. Importation prohibitions: Enforcement and disposition of excluded articles.

### § 601. Manufacture, importation, and public distribution of certain copies

(a) Prior to July 1, 1982, and except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

(b) The provisions of subsection (a) do not apply—

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if such author is a national of the United States, he or she has been domiciled outside the United States for a continuous period of at least one year immediately preceding that date; in the case of a work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise;

(2) where the United States Customs Service is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than two thousand copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by such owner at the time of registration for the work under section 408 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the Government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought—

(A) by any person with respect to no more than one copy of any work at any one time;

(B) by any person arriving from outside the United States, with respect to copies forming part of such person's personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

(5) where the copies are reproduced in raised characters for the use of the blind; or

(6) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than two thousand copies of any one such work, which have not been manufactured in the United States or Canada, are publicly distributed in the United States; or

(7) where, on the date when importation is sought or public distribution in the United States is made—

(A) the author of any substantial part of such material is an individual and receives compensation for the transfer or license of the right to distribute the work in the United States; and

(B) the first publication of the work has previously taken place outside the United States under a transfer or license granted by such author to a transferee or licensee who was not a national or domiciliary of the United States or a domestic corporation or enterprise; and

(C) there has been no publication of an authorized edition of the work of which the copies were manufactured in the United States; and

(D) the copies were reproduced under a transfer or license granted by such author or by the transferee or licensee of the right of first publication as mentioned in subclause (B), and the transferee or the licensee of the right of reproduction was not a national or domiciliary of the United States or a domestic corporation or enterprise.

(c) The requirement of this section that copies be manufactured in the United States or Canada is satisfied if—

(1) in the case where the copies are printed directly from type that has been set, or directly from plates made from such type, the setting of the type and the making of the plates have been performed in the United States or Canada; or

(2) in the case where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies, the making of the plates has been performed in the United States or Canada; and

(3) in any case, the printing or other final process of producing multiple copies and any binding of the copies have been performed in the United States or Canada.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material, if the infringer proves—

(1) that copies of the work have been imported into or publicly distributed in the United States in violation of this section by or with the authority of the owner of such exclusive rights; and

(2) that the infringing copies were manufactured in the United States or Canada in accordance with the provisions of subsection (c); and

(3) that the infringement was commenced before the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States or Canada in accordance with the provisions of subsection (c).

(e) In any action for infringement of the exclusive rights to reproduce and distribute copies of a work containing material required by this section to be manufactured in the United States or Canada, the copyright owner shall set forth in the complaint the names of the persons or organizations who performed the processes specified by subsection (c) with respect to that material, and the places where those processes were performed.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2588.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO 94-1476

**The Requirement in General.** A chronic problem in efforts to revise the copyright statute for the past 85 years has been the need to reconcile the interests of the American printing industry with those of authors and other copyright owners. The scope and impact of the "manufacturing clause," which came into the copyright law as a compromise in 1891, have been gradually narrowed by successive amendments.

Under the present statute, with many exceptions and qualifications, a book or periodical in the English language must be manufactured in the United States in order to receive full copyright protection. Failure to comply with any of the complicated requirements can result in complete loss of protection. Today the main effects of the manufacturing requirements are on works by American authors.

The first and most important question here is whether the manufacturing requirement should be retained in the statute in any form. Beginning in 1965, serious efforts at compromising the issue were made by various intereats aimed at substantially narrowing the scope of the requirement, and these efforts produced the version of section 601 adopted by the Senate when it passed S. 22.

The principal arguments for elimination of the manufacturing requirement can be summarized as follows:

1. The manufacturing clause originated as a response to a historical situation that no longer exists. Its requirements have gradually been relaxed over the years, and the results of the 1954 amendment, which partially eliminated it, have borne out predictions of positive economic benefits for all concerned, including printers, printing trades union members, and the public.

2. The provision places unjustified burdens on the author, who is treated as a hostage. It hurts the author most where it benefits the manufacturer least: in cases where the author must publish abroad or not at all. It unfairly discriminates between American authors and other authors, and between authors of books and authors of other works.

3. The manufacturing clause violates the basic principle that an author's rights should not be dependent on the circumstances of manufacture. Complete repeal would substantially reduce friction with foreign authors and publishers, increase opportunities for American authors to have their works published, encourage international publishing ventures, and eliminate the tangle of procedural requirements now burdening authors, publishers, the Copyright Office, and the United States Customs Service.

4. Studies prove that the economic fears of the printing industry and unions are unfounded. The vast bulk of American titles are completely manufactured in the United States, and U.S. exports of printed matter are much greater than imports. The American book manufacturing industry is healthy and growing, to the extent that it cannot keep pace with its orders. There are increasing advantages to domestic manufacture because of improved technology, and because of the delays, inconveniences, and other disadvantages of foreign manufacture. Even with repeal, foreign manufacturing would be confined to small editions and scholarly works, some of which could not be published otherwise.

The following were the principal arguments in favor of retaining some kind of manufacturing restriction.

1. The historical reasons for the manufacturing clause were valid originally and still are. It is unrealistic to speak of this as a "free trade" issue or of tariffs as offering any solution, since book tariffs have been removed entirely under the Florence Agreement. The manufacturing requirement remains a reasonable and justifiable condition to the granting of a monopoly. There is no problem of international comity, since only works by American authors are affected by section 601. Foreign countries have many kinds of import barriers, currency controls, and similar restrictive devices comparable to a manufacturing requirement.

2. The differentials between U.S. and foreign wage rates in book production are extremely broad and are not diminishing: Congress should not create a condition whereby work can be done under the most degraded working conditions in the world, be given free entry, and thus exclude American manufacturers from the market. The manufacturing clause has been responsible for a strong and enduring industry. Repeal could destroy small businesses, bring chaos to the industry, and catch manufacturers, whose labor costs and break-even points are extremely high, in a cost-price squeeze at a time when expenditures for new equipment have reduced profits to a minimum.

3. The high ratio of exports to imports could change very quickly without a manufacturing requirement. Repeal would add to the balance-of-payments deficit since foreign publishers never manufacture here. The U.S. publishing industry has large investments abroad, and attacks on the manufacturing clause by foreign publishers, show a keen anticipation for new business. The book publishers arguments that repeal would have no real economic impact are contradicted by their arguments that the manufacturing requirement is stifling scholarship and crippling publishing; their own figures show a 250 percent rise in English-language book imports in 10 years.

After carefully weighing these arguments, the Committee concludes that there is no justification on principle for a manufacturing requirement in the copyright statute, and although there may have been some economic justification for it at one time, that justification no longer exists. While it is true that section 601 represents a substantial liberalization and that it would remove many of the inequities of the present manufacturing requirement, the real issue is whether retention of a provision of this sort in a copyright law can continue to be justified. The Committee believes it cannot.

The Committee recognizes that immediate repeal of the manufacturing requirement might have damaging effects in some segments of the U.S. printing industry. It has therefore amended section 601 to retain the liberalized requirement through the end of 1980, but to repeal it definitively as of January 1, 1981. It also adopted an amendment further ameliorating the

effect of this temporary legislation on individual American authors.

In view of this decision, the detailed discussion of section 601 that follows will cease to be of significance after 1980.

**Works Subject to the Manufacturing Requirement.** The scope of the manufacturing requirement, as set out in subsections (a) and (b) of section 601, is considerably more limited than that of present law. The requirements apply to "a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title," and would thus not extend to: dramatic, musical, pictorial, or graphic works; foreign-language, bilingual, or multilingual works; public domain material; or works consisting preponderantly of material that is not subject to the manufacturing requirement.

The term "literary material" does not connote any criterion of literary merit or qualitative value; it includes catalogs, directories and "similar materials."

A work containing "nondramatic literary material that is in the English language and is protected under this title," and also containing dramatic, musical, pictorial, graphic, foreign-language, public domain, or other material that is not subject to the manufacturing requirement, or any combination of these, is not considered to consist "preponderantly" of the copyright-protected nondramatic English-language literary material unless such material exceeds the exempted material in importance. Thus, where the literary material in a work consists merely of a foreword or preface, and captions, headings, or brief descriptions or explanations of pictorial, graphic or other nonliterary material, the manufacturing requirement does not apply to the work in whole or in part. In such case, the non-literary material clearly exceeds the literary material in importance, and the entire work is free of the manufacturing requirement.

On the other hand, if the copyright-protected nondramatic English-language literary material in the work exceeds the other material in importance, then the manufacturing requirement applies. For example, a work containing pictorial, graphic, or other non-literary material is subject to the manufacturing requirement if the non-literary material merely illustrates a textual narrative or exposition, regardless of the relative amount of space occupied by each kind of material. In such a case, the narrative or exposition comprising the literary material plainly exceeds in importance the non-literary material in the work. However, even though such a work is subject to the manufacturing requirement, only the portions consisting of copyrighted non-dramatic literary material in English are required to be manufactured in the United States or Canada. The illustrations may be manufactured elsewhere without affecting their copyright status.

Under section 601(b)(1) works by American nationals domiciled abroad for at least a year would be exempted. The manufacturing requirement would generally apply only to works by American authors domiciled here, and then only if none of the co-authors of the work are foreign.

In order to make clear the application of the foreign-author exemption to "works made for hire"—of which the employer or other person for whom the work was prepared is considered the "author" for copyright purposes—section 601(b)(1) provides that the exemption does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States, or a domestic corporation or enterprise. The reference to "a domestic corporation or enterprise" is intended to include a subsidiary formed by the domestic corporation or enterprise primarily for the purpose of obtaining the exemption.

The provision adopts a proposal put forward by various segments of both the United States and the Canadian printing industries, recommending an exemption for copies manufactured in Canada. Since wage standards in Canada are substantially comparable to those in the United States, the arguments for equal treatment under the manufacturing clause are persuasive.

**Limitations on Importation and Distribution of Copies Manufactured Abroad.** The basic purpose of the temporary manufacturing requirements of section 601, like that of the present manufacturing clause, is to induce the manufacture of an edition in the United States if more than a certain limited number of copies are to be distributed in this country. Subsection (a) therefore provides in general that "the importation into or public distribution in the United States" of copies not complying with the manufacturing clause is prohibited. Subsection (b) then sets out the exceptions to this prohibition, and clause (2) of that subsection fixes the importation limit at 2,000 copies.

Additional exceptions to the copies affected by the manufacturing requirements are set out in clauses (3) through (7) of subsection (b). Clause (3) permits importation of copies for governmental use, other than in schools, by the United States or by "any State or political subdivision of a State." Clause (4) allows importation for personal use of "no more than one copy of any work at any one time," and also exempts copies in the baggage of persons arriving from abroad and copies intended for the library collection of nonprofit scholarly, educational, or religious organizations. Braille copies are completely exempted under clause (5), and clause (6) permits the public distribution in the United States of copies allowed entry by the other clauses of that subsection. Clause (7) is a new exception, covering cases in which an individual American author has, through choice or necessity, arranged for publication of his work by a foreign rather than a domestic publisher.

**What Constitutes "Manufacture in the United States" or Canada.** A difficult problem in the manufacturing clause controversy involves the restrictions to be imposed on foreign typesetting or composition. Under what they regard as a loophole in the present law, a number of publishers have for years been having their manuscripts set in type abroad, importing "reproduction proofs," and then printing their books from offset plates "by lithographic process * * * wholly performed in the United States." The language of the statute on this point is ambiguous and, although the publishers' practice has received some support from the Copyright Office, there is a question as to whether or not it violates the manufacturing requirements.

In general the book publishers have opposed any definition of domestic manufacture that would close the "repro proof" loophole or that would interfere with their use of new techniques of book production, including use of imported computer tapes for composition here. This problem was the focal point of a compromise agreement between representatives of the book publishers and authors on the one side and of typographical firms and printing trades unions on the other, and the bill embodies this compromise as a reasonable solution to the problem.

Under subsection (c) the manufacturing requirement is confined to the following processes: (1) Typesetting and platemaking, "where the copies are printed directly from type that has been set, or directly from plates made from such type"; (2) the making of plates, "where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies"; and (3) in all cases, the "printing or other final process of producing multiple copies and any binding of the copies." Under the subsection there would be nothing to prevent the importation of reproduction proofs, however they were prepared, as long as the plates from which the copies are printed are made here and are not themselves imported. Similarly, the importation of computer tapes from which plates can be prepared here would be permitted. However, regardless of the process involved, the actual duplication of multiple copies, together with any binding, are required to be done in the United States or Canada.

**Effect of Noncompliance with Manufacturing Requirement.** Subsection (d) of section 601 makes clear that compli-

ance with the manufacturing requirements no longer constitutes a condition of copyright with respect to reproduction and the distribution of copies. The bill does away with the special "ad interim" time limits and registration requirements of the present law and, even if copies are imported or distributed in violation of the section, there would be no effect on the copyright owner's right to make and distribute phonorecords of the work, to make derivative works including dramatizations and motion pictures, and to perform or display the work publicly. Even the rights to reproduce and distribute copies are not lost in cases of violation, although they are limited as against certain infringers.

Subsection (d) provides a complete defense in any civil action or criminal proceeding for infringement of the exclusive rights of reproduction or distribution of copies where, under certain circumstances, the defendant proves violation of the manufacturing requirements. The defense is limited to infringement of the "nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material." This means, for example, that the owner of copyright in photographs or illustrations published in a book copyrighted by someone else who would not be deprived of rights against an infringer who proves that there had been a violation of section 601.

Section 601(d) places the full burden for proving violation on the infringer. The infringer's defense must be based on proof that: (1) copies in violation of section 601 have have imported or publicly distributed in the United States "by or with the authority" of the copyright owner; and (2) that the infringing copies complied with the manufacturing requirements; and (3) that the infringement began before an authorized edition complying with the requirements had been registered. The third of these clauses of subsection (d) means, in effect, that a copyright owner can reinstate full exclusive rights by manufacturing an edition in the United States and making registration for it.

Subsection (e) requires the plaintiff in any infringement action involving publishing rights in material subject to the manufacturing clause to identify the manufacturers of the copies in his complaint. Correspondingly, section 409 would require the manufacturers to be identified in applications for registration covering published works subject to the requirements of section 601.

### Cross References

Application for copyright registration, names of persons or organizations who performed the processes specified in this section, see section 409 of this title.

Fee for issuance of import statement, see section 708 of this title.

### Section Referred to in Other Sections

This section is referred to in sections 409, 602, 708 of this title.

## § 602. Infringing importation of copies or phonorecords

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501. This subsection does not apply to—

(1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;

(2) importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the United States with respect to copies or phonorecords forming part of such person's personal baggage; or

(3) importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).

(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the United States Customs Service has no authority to prevent their importation unless the provisions of section 601 are applicable. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Customs Service of the importation of articles that appear to be copies or phonorecords of the work.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2589.)

### Historical and Revision Notes

#### House Report No. 94–1476

Scope of the Section. Section 602, which has nothing to do with the manufacturing requirements of section 601, deals with two separate situations: importation of "piratical" articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the United States Customs Service to prohibit importation only of "piratical" articles.

Section 602(a) first states the general rule that unauthorized importation is an infringement merely if the copies or phonorecords "have been acquired outside the United States", but then enumerates three specific exceptions: (1) importation under the authority or for the use of a governmental body, but not including material for use in schools or copies of an audiovisual work imported for any purpose other than archival use; (2) importation for the private use of the importer of no more than one copy or phonorecord of a work at a time, or of articles in the personal baggage of travelers from abroad; or (3) importation by nonprofit organizations "operated for scholarly, educational, or religious purposes" of "no more than one

copy of an audiovisual work solely for archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes." The bill specifies that the third exception does not apply if the importation "is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2)."

If none of the three exemptions applies, any unauthorized importer of copies or phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.

**Importation of "Piratical" Copies.** Section 602(b) retains the present statute's prohibition against importation of "piratical" copies or phonorecords—those whose making "would have constituted an infringement of copyright if this title has been applicable." Thus, the Customs Service could exclude copies or phonorecords that were unlawful in the country where they were made; it could also exclude copies or phonorecords which, although made lawfully under the domestic law of that country, would have been unlawful if the U.S. copyright law could have been applied. A typical example would be a work by an American author which is in the public domain in a foreign country because that country does not have copyright relations with the United States; the making and publication of an authorized edition would be lawful in that country, but the Customs Service could prevent the importation of any copies of that edition.

**Importation for Infringing Distribution.** The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the United States Customs Service to attempt to enforce the importation prohibition, and section 602(b) provides that, unless a violation of the manufacturing requirements is also involved, the Service has no authority to prevent importation, "where the copies or phonorecords were lawfully made." The subsection would authorize the establishment of a procedure under which copyright owners could arrange for the Customs Service to notify them wherever articles appearing to infringe their works are imported.

CROSS REFERENCES

Importer of copies or phonorecords into the United States as infringer, see section 501 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 501, 603 of this title.

### § 603. Importation prohibitions: Enforcement and disposition of excluded articles

(a) The Secretary of the Treasury and the United States Postal Service shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 602—

(1) that the person seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that the person seeking exclusion furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which such person claims an interest is valid and that the importation would violate the prohibition in section 602; the person seeking exclusion may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his or her acts constituted a violation of law.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2590.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

The importation prohibitions of both sections 601 and 602 would be enforced under section 603, which is similar to section 109 of the statute now in effect [section 109 of former title 17]. Subsection (a) would authorize the Secretary of the Treasury and the United States Postal Service to make regulations for this purpose, and subsection (c) provides for the disposition of excluded articles.

Subsection (b) of section 603 deals only with the prohibition against importation of "piratical" copies or phonorecords, and is aimed at solving problems that have arisen under the present statute. Since the United States Customs Service is often in no position to make determinations as to whether particular articles are "piratical," section 603(b) would permit the Customs regulations to require the person seeking exclusion either to obtain a court order enjoining importation, or to furnish proof of his claim and to post bond.

REFERENCES IN TEXT

The customs revenue laws, referred to in subsec. (c), are classified generally to Title 19, Customs Duties.

## CHAPTER 7—COPYRIGHT OFFICE

Sec.
701. The Copyright Office: General responsibilities and organization.
702. Copyright Office regulations.
703. Effective date of actions in Copyright Office.
704. Retention and disposition of articles deposited in Copyright Office.
705. Copyright Office records: Preparation, maintenance, public inspection, and searching.
706. Copies of Copyright Office records.
707. Copyright Office forms and publications.
708. Copyright Office fees.
709. Delay in delivery caused by disruption of postal or other services.
710. Reproductions for use of the blind and physically handicapped: Voluntary licensing forms and procedures.

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94–1476

Chapter 7 entitled "Copyright Office," sets forth the administrative and housekeeping provisions of the bill.

**Administrative Procedure Act.** Under an amendment to section 701 adopted by the Committee, the Copyright Office is made fully subject to the Administrative Procedure Act [5 U.S.C. 551 et seq. and 701 et seq.] with

one exception: under section 706(b), reproduction and distribution of copyright deposit copies would be made under the Freedom of Information Act [5 U.S.C. 552] only to the extent permitted by the Copyright Office regulations.

**Retention and Disposition of Deposited Articles.** A recurring problem in the administration of the copyright law has been the need to reconcile the storage limitations of the Copyright Office with the continued value of deposits in identifying copyrighted works. Aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits, other than those selected by the Library of Congress, would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed. The basic policy behind section 704 is that copyright deposits should be retained as long as possible, but that the Register of Copyrights and the Librarian of Congress should be empowered to dispose of them under appropriate safeguards when they decide that it has become necessary to do so.

Under subsection (a) of section 704, any copy, phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States Government." This means that the copyright owner or person who made the deposit cannot demand its return as a matter of right, even in rejection cases, although the provisions of section 407 and 408 are flexible enough to allow for special arrangements in exceptional cases. On the other hand, Government ownership of deposited articles under section 704(a) carries with it no privileges under the copyright itself; use of a deposited article in violation of the copyright owner's exclusive rights would be infringement.

With respect to published works, section 704(b) makes all deposits available to the Library of Congress "for its collections, or for exchanges or transfer to any other library"; where the work is unpublished, the Library is authorized to select any deposit for its own collections or for transfer to the National Archives of the United States or to a Federal records center.

Motion picture producers have expressed some concern lest the right to transfer copies of works, such as motion pictures, that have been published under rental, lease, or loan arrangements, might lead to abuse. However, the Library of Congress has not knowingly transferred works of this sort to other libraries in the past, and there is no reason to expect it to do so in the future.

The Committee added a new subsection (c) to section 704, under which the Register is authorized to make microfilm or other record copies of copyright deposits before transferring or otherwise disposing of them.

For deposits not selected by the Library, subsection (d) provides that they, or "identifying portions or reproductions of them," are to be retained under Copyright Office control "for the longest period considered practicable and desirable" by the Register and the Librarian. When and if they ultimately decide that retention of certain deposited articles is no longer "practicable and desirable," the Register and Librarian have joint discretion to order their "destruction or other disposition." Because of the unique value and irreplaceable nature of unpublished deposits, the subsection prohibits their intentional destruction during their copyright term, unless a facsimile reproduction has been made.

Subsection (e) of section 704 establishes a new procedure under which a copyright owner can request retention of deposited material for the full term of copyright. The Register of Copyrights is authorized to issue regulations prescribing the fees for this service and the "conditions under which such requests are to be made and granted."

**Catalog of Copyright Entries.** Section 707(a) of the bill retains the present statute's basis requirement that the Register compile and publish catalogs of all copyright registrations at periodic intervals, but provides for "discretion to determine, on the basis of practicability and usefulness the form and frequency of publication of each particular part". This provision will in no way diminish the utility or value of the present catalogs, and the flexibility of approach, coupled with use of the new mechanical and electronic devices now becoming available, will avoid waste and result in a better product.

**Copyright Office Fees.** The schedule of fees set out in section 708 reflects a general increase in the fees of the Copyright Office from those established by the Congress in 1965. The basic fees are $10 for registration, $6 for renewal registration, $10 for recordation of documents and $10 per hour for searching. The section also contains new fee provisions needed because of new requirements or services established under the bill, and subsection (a)(11) authorizes the Register to fix additional fees, on the "basis of the cost of providing the service," "for any other special services requiring a substantial amount of time or expense." Subsection (b) makes clear that, except for the possibility of waivers in "occasional or isolated cases involving relatively small amounts," the Register is to charge fees for services rendered to other Government agencies.

**Postal Interruptions.** Section 709 authorizes the Register of Copyrights to issue regulation to permit the acceptance by the Copyright Office of documents which are delivered after the close of the prescribed period if the delay was caused by a general disruption or suspension of postal or other transportation or communications services.

**Reproductions for the Blind and Handicapped.** Section 710 directs the Register of Copyrights to establish by regulation forms and procedures by which the copyright owners of certain categories of works may voluntarily grant to the Library of Congress a license to reproduce and distribute copies or phonorecords of the work solely for the use of the blind and physically handicapped.

### § 701. The Copyright Office: General responsibilities and organization

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision.

(b) The Register of Copyrights shall adopt a seal to be used on and after January 1, 1978, to authenticate all certified documents issued by the Copyright Office.

(c) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the previous fiscal year. The annual report of the Register of Copyrights shall be published separately and as a part of the annual report of the Librarian of Congress.

(d) Except as provided by section 706(b) and the regulations issued thereunder, all actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, Chapter 5, Subchapter II and Chapter 7).

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2591.)

REFERENCES IN TEXT

The Administrative Procedure Act of June 11, 1946, referred to in subsec. (d), was repealed and the provisions thereof were reenacted as subchapter II of chapter 5, and chapter 7, of Title 5, Government Organization and Employees, by Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378.

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

Pub. L. 93-573, title II, §§ 201 to 208, Dec. 31, 1974, 88 Stat. 1873 to 1875, as amended by Pub. L. 94-314, June 21, 1976, 90 Stat. 692; Pub. L. 95-146, Oct. 28, 1977, 91 Stat. 1226, provided that:

"ESTABLISHMENT AND PURPOSE OF COMMISSION

"Sec. 201. (a) There is hereby created in the Library of Congress a National Commission on New Technological Uses of Copyrighted Works (hereafter called the Commission).

"(b) The purpose of the Commission is to study and compile data on:

"(1) the reproduction and use of copyrighted works of authorship—

"(A) in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and

"(B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities; and

"(2) the creation of new works by the application or intervention of such automatic systems or machine reproduction.

"(c) The Commission shall make recommendations as to such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works, and to provide recognition of the rights of copyright owners.

"MEMBERSHIP OF THE COMMISSION

"Sec. 202. (a) The Commission shall be composed of thirteen voting members, appointed as follows:

"(1) Four members, to be appointed by the President, selected from authors and other copyright owners;

"(2) Four members, to be appointed by the President, selected from users of copyright works;

"(3) Four nongovernmental members to be appointed by the President, selected from the public generally, with at least one member selected from among experts in consumer protection affairs;

"(4) The Librarian of Congress.

"(b) The President shall appoint a Chairman, and a Vice Chairman who shall act as Chairman in the absence or disability of the Chairman or in the event of a vacancy in that office, from among the four members selected from the public generally, as provided by clause (3) of subsection (a). The Register of Copyrights shall serve ex officio as a nonvoting member of the Commission.

"(c) Seven voting members of the Commission shall constitute a quorum.

"(d) Any vacancy in the Commission shall not affect its powers and shall be filled in the same manner as the original appointment was made.

"COMPENSATION OF MEMBERS OF COMMISSION

"Sec. 203. (a) Members of the Commission, other than officers or employees of the Federal Government, shall receive compensation at the rate of $100 per day while engaged in the actual performance of Commission duties, plus reimbursement for travel, subsistence, and other necessary expenses in connection with such duties.

"(b) Any members of the Commission who are officers or employees of the Federal Government shall serve on the Commission without compensation, but such members shall be reimbursed for travel, subsistence, and other necessary expenses in connection with the performance of their duties.

"STAFF

"Sec. 204. (a) To assist in its studies, the Commission may appoint a staff which shall be an administrative part of the Library of Congress. The staff shall be headed by an Executive Director, who shall be responsible to the Commission for the Administration of the duties entrusted to the staff.

"(b) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5, United States Code but at rates not to exceed $100 per day.

"EXPENSES OF THE COMMISSION

"Sec. 205. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this title until and including the day on which the Commission terminates.

"REPORTS

"Sec. 206. (a) Within one year after the first meeting of the Commission it shall submit to the President and the Congress a preliminary report on its activities.

"(b) On or before July 31, 1978, the Commission shall submit to the President and the Congress a final report on its study and investigation which shall include its recommendations and such proposals for legislation and administrative action as may be necessary to carry out its recommendations.

"(c) In addition to the preliminary report and final report required by this section, the Commission may publish such interim reports as it may determine, including but not limited to consultant's reports, transcripts of testimony, seminar reports, and other Commission findings.

"POWERS OF THE COMMISSION

"Sec. 207. (a) The Commission or, with the authorization of the Commission, any three or more of its members, may, for the purpose of carrying out the provisions of this title, hold hearings, administer oaths, and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of documentary material.

"(b) With the consent of the Commission, any of its members may hold any meetings, seminars, or conferences considered appropriate to provide a forum for discussion of the problems with which it is dealing.

"TERMINATION

"Sec. 208. On the sixtieth day after the date of the submission of its final report, the Commission shall terminate and all offices and employment under it shall expire."

FEDERAL RULES OF CIVIL PROCEDURE

Proof of official record, see rule 44, Title 28, Appendix, Judiciary and Judicial Procedure.

FEDERAL RULES OF EVIDENCE

Hearsay exception, public records and reports, see rule 803, Title 28, Appendix, Judiciary and Judicial Procedure.

Self-authentication, domestic public documents under seal, see rule 902.

CROSS REFERENCES

Authenticated copies of records and papers of department or agency admissible, see section 1733 of Title 28, Judiciary and Judicial Procedure.

### § 702. Copyright Office regulations

The Register of Copyrights is authorized to establish regulations not inconsistent with law

for the administration of the functions and duties made the responsibility of the Register under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2591.)

**§ 703. Effective date of actions in Copyright Office**

In any case in which time limits are prescribed under this title for the performance of an action in the Copyright Office, and in which the last day of the prescribed period falls on a Saturday, Sunday, holiday, or other nonbusiness day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2591.)

**§ 704. Retention and disposition of articles deposited in Copyright Office**

(a) Upon their deposit in the Copyright Office under sections 407 and 408, all copies, phonorecords, and identifying material, including those deposited in connection with claims that have been refused registration, are the property of the United States Government.

(b) In the case of published works, all copies, phonorecords, and identifying material deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled, under regulations that the Register of Copyrights shall prescribe, to select any deposits for its collections or for transfer to the National Archives of the United States or to a Federal records center, as defined in section 2901 of title 44.

(c) The Register of Copyrights is authorized, for specific or general categories of works, to make a facsimile reproduction of all or any part of the material deposited under section 408, and to make such reproduction a part of the Copyright Office records of the registration, before transferring such material to the Library of Congress as provided by subsection (b), or before destroying or otherwise disposing of such material as provided by subsection (d).

(d) Deposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office, including retention in Government storage facilities, for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress. After that period it is within the joint discretion of the Register and the Librarian to order their destruction or other disposition; but, in the case of unpublished works, no deposit shall be knowingly or intentionally destroyed or otherwise disposed of during its term of copyright unless a facsimile reproduction of the entire deposit has been made a part of the Copyright Office records as provided by subsection (c).

(e) The depositor of copies, phonorecords, or identifying material under section 408, or the copyright owner of record, may request retention, under the control of the Copyright Office, of one or more of such articles for the full term of copyright in the work. The Register of Copyrights shall prescribe, by regulation, the conditions under which such requests are to be made and granted, and shall fix the fee to be charged under section 708(a)(11) if the request is granted.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2591.)

**§ 705. Copyright Office records: Preparation, maintenance, public inspection, and searching**

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordations, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

(c) Upon request and payment of the fee specified by section 708, the Copyright Office shall make a search of its public records, indexes, and deposits, and shall furnish a report of the information they disclose with respect to any particular deposits, registrations, or recorded documents.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2592.)

FEDERAL RULES OF EVIDENCE

Hearsay exception, public records and reports, see rule 803, Title 28, Appendix, Judiciary and Judicial Procedure.

CROSS REFERENCES

Certificate of registration under seal as prima facie evidence of facts stated therein, see section 410 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 708 of this title.

**§ 706. Copies of Copyright Office records**

(a) Copies may be made of any public records or indexes of the Copyright Office; additional certificates of copyright registration and copies of any public records or indexes may be furnished upon request and payment of the fees specified by section 708.

(b) Copies or reproductions of deposited articles retained under the control of the Copyright Office shall be authorized or furnished only under the conditions specified by the Copyright Office regulations.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2592.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 701, 708 of this title.

**§ 707. Copyright Office forms and publications**

**(a) Catalog of copyright entries**

The Register of Copyrights shall compile and publish at periodic intervals catalogs of all

copyright registrations. These catalogs shall be divided into parts in accordance with the various classes of works, and the Register has discretion to determine, on the basis of practicability and usefulness, the form and frequency of publication of each particular part.

**(b) Other publications**

The Register shall furnish, free of charge upon request, application forms for copyright registration and general informational material in connection with the functions of the Copyright Office. The Register also has the authority to publish compilations of information, bibliographies, and other material he or she considers to be of value to the public.

**(c) Distribution of publications**

All publications of the Copyright Office shall be furnished to depository libraries as specified under section 1905 of title 44, and, aside from those furnished free of charge, shall be offered for sale to the public at prices based on the cost of reproduction and distribution.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2592.)

**§ 708. Copyright Office fees**

(a) The following fees shall be paid to the Register of Copyrights:

(1) for the registration of a copyright claim or a supplementary registration under section 408, including the issuance of a certificate of registration, $10;

(2) for the registration of a claim to renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration, $6;

(3) for the issuance of a receipt for a deposit under section 407, $2;

(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title, $10; for each page over six and each title over one, 50 cents additional;

(5) for the filing, under section 115(b), of a notice of intention to make phonorecords, $6;

(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseudonymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, $10 for a document of six pages or less, covering no more than one title; for each page over six and for each title over one, $1 additional;

(7) for the issuance, under section 601, of an import statement, $3;

(8) for the issuance, under section 706, of an additional certificate of registration, $4;

(9) for the issuance of any other certification, $4; the Register of Copyrights has discretion, on the basis of their cost, to fix the fees for preparing copies of Copyright Office records, whether they are to be certified or not;

(10) for the making and reporting of a search as provided by section 705, and for any related services, $10 for each hour or fraction of an hour consumed;

(11) for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

(b) The fees prescribed by or under this section are applicable to the United States Government and any of its agencies, employees, or officers, but the Register of Copyrights has discretion to waive the requirement of this subsection in occasional or isolated cases involving relatively small amounts.

(c) All fees received under this section shall be deposited by the Register of Copyrights in the Treasury of the United States and shall be credited to the appropriation for necessary expenses of the Copyright Office. The Register may, in accordance with regulations that he or she shall prescribe, refund any sum paid by mistake or in excess of the fee required by this section; however, before making a refund in any case involving a refusal to register a claim under section 410(b), the Register may deduct all or any part of the prescribed registration fee to cover the reasonable administrative costs of processing the claim.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2593, and amended Pub. L. 95-94, title IV, § 406(b), Aug. 5, 1977, 91 Stat. 682.)

AMENDMENTS

1977—Subsec. (c). Pub. L. 95-94 substituted provisions relating to crediting of all fees received, to the appropriation for necessary expenses of the Copyright Office, for provisions relating to crediting of all fees received in the manner directed by the Secretary of the Treasury.

EFFECTIVE DATE OF 1977 AMENDMENT

Section 406(b) of Pub. L. 95-94 provided in part that the amendment by Pub. L. 95-94 is effective Jan. 1, 1978.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 205, 407, 408, 704 to 706 of this title.

**§ 709. Delay in delivery caused by disruption of postal or other services**

In any case in which the Register of Copyrights determines, on the basis of such evidence as the Register may by regulation require, that a deposit, application, fee, or any other material to be delivered to the Copyright Office by a particular date, would have been received in the Copyright Office in due time except for a general disruption or suspension of postal or other transportation or communications services, the actual receipt of such material in the Copyright Office within one month after the date on which the Register determines that the disruption or suspension of such services has terminated, shall be considered timely.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2594.)

**§ 710. Reproduction for use of the blind and physically handicapped: Voluntary licensing forms and procedures**

The Register of Copyrights shall, after consultation with the Chief of the Division for the

Blind and Physically Handicapped and other appropriate officials of the Library of Congress, establish by regulation standardized forms and procedures by which, at the time applications covering certain specified categories of nondramatic literary works are submitted for registration under section 408 of this title, the copyright owner may voluntarily grant to the Library of Congress a license to reproduce the copyrighted work by means of Braille or similar tactile symbols, or by fixation of a reading of the work in a phonorecord, or both, and to distribute the resulting copies or phonorecords solely for the use of the blind and physically handicapped and under limited conditions to be specified in the standardized forms.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2594.)

## CHAPTER 8—COPYRIGHT ROYALTY TRIBUNAL

Sec.
801. Copyright Royalty Tribunal: Establishment and purpose.
802. Membership of the Tribunal.
803. Procedures of the Tribunal.
804. Institution and conclusion of proceedings.
805. Staff of the Tribunal.
806. Administrative support of the Tribunal.
807. Deduction of costs of proceedings.
808. Reports.
809. Effective date of final determinations.
810. Judicial review.

### Historical and Revision Notes

#### House Report No. 94-1476

Chapter 8 [this chapter] establishes a Copyright Royalty Commission for the purpose of periodically reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory licenses provided in sections 111 (secondary transmissions by cable systems), 115 (mechanical royalties) and 116 (jukebox) of the bill. In addition, the Commission will make determinations as to reasonable terms and rates of royalty payments as provided in section 118 (public broadcasting), and to resolve disputes over the distribution of royalties paid pursuant to the statutory licenses in sections 111 and 116.

The Committee recognizes that the industries affected by the royalty rates over which the Commission has jurisdiction are very different, and it is therefore expected that any adjustment of a rate by the Commission shall be based on the economic conditions peculiar to the industries affected by that rate. Likewise, the Committee recognizes the fact that the cable television industry is a developing industry in transition, whereas the recording and jukebox industries are long-established. Therefore, the Committee has chosen periods of different lengths in which the Commission is to review the rates affecting those industries. Rates for retransmission of copyrighted works by cable television systems will be reviewed in 1980 and each subsequent fifth year. Rates established for mechanical reproduction will be reviewed in 1980, 1987, and in each subsequent 10th year. Rates for performance by jukebox will be reviewed in 1980, and in each subsequent 10th year. Rates and terms under section 118 will be reviewed in 1982 and in each subsequent fifth year. The Committee does not intend that rate changes, whether up or down, should necessarily be made as the result of such periodic reviews.

The Committee has chosen to stagger the times for review of the various rates established under the bill so as to balance the workload of the Commission. Cable and copyright owners agreed to a set of standards for the adjustment of rates which the Committee in large measure has accepted. No specific standards governing the establishment or adjustment of rates by the Commission, other than rates for cable transmissions, have been detailed in the legislation, because the Committee did not wish to limit the factors that the Commission might consider in a world of constantly changing economics and technology. However, it is anticipated that the Commission will consider the following objectives in determining a reasonable rate under sections 115 and 116:

(1) The rate should maximize the availability of diverse creative works to the public.

(2) The rate should afford the copyright owner a fair income, or if the owner is not a person, a fair profit, under existing economic conditions, in order to encourage creative activity.

(3) The rate should not jeopardize the ability of the copyright user

(a) to earn a fair income, or if the user is not a person, a fair profit, under existing economic conditions, and

(b) to charge the consumer a reasonable price for the product.

(4) The rate should reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(5) The rate should minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Similar considerations are noted in connection with Commission review of rates and terms for public broadcasting in the discussion of section 118, above.

**Structure of the Copyright Royalty Commission.** The Senate bill provides that, upon certifying the existence of a controversy concerning distribution of statutory royalty fees or upon periodic petition for review of statutory royalty rates by an interested party, the Register of Copyrights, is to convene a three member panel to constitute a Copyright Royalty Tribunal for the purpose of resolving the controversy or reviewing the rates.

The Senate bill provides that the Tribunal be appointed by the Register from among the membership of the American Arbitration Association or similar organization. The Tribunal is to exist within the Library of Congress.

Due to constitutional concern over the provision of the Senate bill that the Register of Copyrights, an employee of the Legislative Branch, appoint the members of the Tribunal, the Committee adopted an amendment providing for direct appointment of three individuals by the President. The name of the Tribunal was changed to the Copyright Royalty Commission.

Although under the Committee Amendment, the Commission is to be an independent authority, it is to receive administrative support from the Library of Congress.

The Commission is authorized to appoint a staff to assist it in carrying out its responsibilities. However, it is expected that the staff will consist only of sufficient clerical personnel to provide one full time secretary for each member and one or two additional employees to meet the clerical needs of the entire Commission. Members of the Commission are expected to perform all professional responsibilities themselves, except where it is necessary to employ outside experts on a consulting basis. Assistance in matters of administration, such as payroll and budgeting, will be available from the Library of Congress.

The Committee expects that the President shall appoint members of the Commission from among persons who have demonstrated professional competence in the field of copyright policy.

**Adjustment of Cable Television Royalty Rates.** Section 801(b)(2) authorizes the Commission to make determinations concerning the adjustment of the copyright

royalty rates contained in Section 111. Such determinations are to be made solely in accordance with the provisions contained in Section 801(b)(2) (A), (B), (C), and (D). The time periods when such adjustments may be made are set forth in Section 804.

Under Section 801(b)(2)(A), the Commission may adjust the rates established in Section 111(d)(2)(B) [section 111(d)(2)(B) of this title] to reflect (1) national monetary inflation or deflation, or (2) changes in the average rates charged cable subscribers for the basic service of providing secondary transmission to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this legislation. The purpose of this provision is to assure that the value of the royalty fees paid by cable systems is not eroded by changes in the value of the dollar or changes in average rates charged cable subscribers. The Committee recognizes, however, that no royalty fees will be paid by cable systems until the legislation is effective on January 1, 1978, and accordingly that the royalty fee per subscriber base calculated at the time of enactment must necessarily constitute an estimated value. In the Committee's view, and based on projections supplied by the interested parties, the total royalties produced under the fee schedule at the time of enactment should approximate $8.7 million.

In adjusting the fee the Copyright Royalty Commission is limited to changes reflecting national monetary inflation or deflation or changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions. Concern was expressed during the hearings on the revision legislation that cable systems may reduce the basic charge for the retransmission of broadcast signals as an inducement for individuals to become subscribers to additional services (e.g. pay-cable). Such a shift of revenue sources would have the effect of understating basic subscriber revenues and would deny copyright owners the level of royalty fees for secondary transmission contemplated by this legislation. Accordingly, such shifts of revenue sources, if they do occur, should be taken into account by the Commission in adjusting the basic rates.

There are also two limitations on the power of the Commission to adjust rates under Section 801(b)(2)(A). The first provides that no change in the rates established by Section 111(d)(2)(B) is permitted if the average rates charged cable system subscribers for the basic service of providing secondary transmissions exceeds the change in national monetary inflation. Thus, in the situation where subscriber rates during a particular adjustment period increase 20 percent but national monetary inflation increases only 10 percent no change or reduction in the rates is permitted.

The second limitation provides that no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The purpose of this limitation is to make clear that if the average number of distant signals carried by a cable system is reduced in the future (and thereby the average number of distant signal equivalents per subscriber) no increase in the royalty fee to offset this reduction is permitted. The limitation does not, however, preclude any change in the rates that may be required to maintain the real constant dollar level of royalty fees per subscriber because of national monetary inflation or deflation or changes in the average rates charged subscribers for the basic service of providing secondary transmissions.

The Commission may also consider, in its discretion, any other factor relating to the maintenance of the real constant dollar level of royalty fees per subscriber and need not increase the royalty rates to the full extent, provided it can be demonstrated that the cable industry has been restrained by subscriber rates regulating authorities from increasing the rates for the basic service of providing secondary transmission.

**Increase in the Number of Distant Signals.** Under Section 801(b)(2)(B), the Commission may adjust the rates established in Section 111(d)(2)(B) if the rules and regulations of the FCC are amended at any time after April 15, 1976, to permit the carriage of additional distant signals. In this event the Commission may ensure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in light of the changes effected by the amendment to the FCC rules and regulations.

The purpose of this provision is to give the Commission broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976. The present FCC rules limiting the number of distant signals that may be carried by cable systems have the effect of protecting copyright owners by restricting the amount of television broadcast programming retransmitted into distant markets. If these rules are changed in the future to allow additional cable carriage of television programs it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes. At the same time, Section 801(b)(2)(B) makes clear that the royalty rates may not be adjusted with respect to (1) distant signals permitted under FCC rules and regulations in effect on April 15, 1976; (2) distant signals of the same type (i.e., independent, network or noncommercial educational) substituted for such permitted signals; or (3) distant television broadcast signals first carried after April 15, 1976, pursuant to an individual waiver of the FCC rules and regulations as such rules and regulations were in effect on April 15, 1976. Royalty adjustments with respect to any distant signal equivalent or any fraction thereof represented by the carriage of such distant signals may be made pursuant to Section 801(b)(2)(A).

In determining the reasonableness of rates under this provision, the Commission should consider, among other factors, the economic impact that such adjustment may have on copyright owners and users, including broadcast stations, and the effect of such additional distant signal equivalents, if any, on local broadcasters' ability to serve the public.

**Change in the Syndicated and Sports Program Exclusivity Rules.** Section 801(b)(2)(C) provides that the Commission may adjust the rates established in Section 111(d)(2)(B) in the event of any change in the FCC rules and regulations with respect to syndicated and sports program exclusivity after April 15, 1976. In this event the rates may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations. Any such adjustment, however, shall only apply to the affected television broadcast signals carried on those systems affected by change. For this purpose, the Commission may exercise its discretion to adopt royalty schedules for particular classes of cable systems.

The purpose of this subclause is similar to that of Section 801(b)(2)(B). The syndicated and sports program exclusivity rules of the FCC have the effect of protecting copyright owners by restricting the cable carriage of certain distant television programming. If these rules are changed in the future to relax or increase the exclusivity restrictions, it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes.

**Adjustment of the Small System Royalty Fees.** Section 801(b)(2)(D) provides that the small system gross receipts limitations established in Section 111(d)(2) (C) and (D) may be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemptions provided therein. That is, the Commission is directed to look at these two factors to insure that systems of the same size as are now entitled to the exemptions provided for in sections 111(d)(2) (C) and (D) continued to be so entitled. For the purposes of section 111(d)(2)(C) references to the gross receipt limitations of that section mean all of the dollar amount specified therein.

**Distribution of Royalty Fees.** Section 801(b)(3) provides that the Commission is authorized to distribute the royalty fees deposited with the Register of Copyrights under Sections 111 and 116 and to determine the distribution of such fees where a controversy exists.

**Institution and Conclusion of Proceedings.** Section 804 establishes the time periods during which the Commission shall institute and conclude proceedings for the adjustment or distribution of royalty fees.

**Periodic Adjustment of Certain Rates.** Under Section 804(a) proceedings to adjust the royalty rates specified in Sections 115 (mechanical royalty) and 116 (juke-box) and proceedings under Section 801(b)(2) (A) and (D) (cable television rates for certain purposes), are instituted in the following periodic time intervals:

(1) On January 1, 1980, the Chairman of the Commission is required to publish in the Federal Register notice of the commencement of proceedings to adjust all the rates referred to in Section 804(a).

(2) Thereafter, during the calendar years specified below, any owner or user of a copyrighted work whose royalty rates are specified in the legislation, or by a rate established by the Commission, may file a petition with the Commission declaring that the petitioner requests an adjustment of the rate. If the Commission determines that the applicant has a significant interest in the royalty rate for which adjustment is requested, the Chairman of the Commission shall cause notice to be published in the Federal Register of this determination together with notice of the commencement of proceedings to adjust the rate.

(A) In proceedings to adjust the cable television rates for certain purposes under Sections 801(b)(2) (A) and (D), such petitions may be filed during 1985 and in each subsequent fifth calendar year.

(B) In proceedings under Section 801(b)(1), to adjust the juke-box royalty rate as provided in Section 116, such petitions may be filed in 1990 and in each subsequent tenth calendar year.

(C) In proceedings under Section 801(b)(1), to adjust the juke-box royalty rate as provided in Section 116, such petitions may be filed in 1990 and in each subsequent tenth calendar year.

**Immediate Review of Cable Television Rates for Certain Purposes.** Section 804(b) provides that following an event described in Section 801(b)(2) (B) or (C), any owner or user of a copyrighted work whose royalty rates are specified by Section 111, or by a rate established by the Commission, may, within 12 months, file a petition requesting an adjustment of the rates. In this event the Commission is required to proceed as in Section 804(a)(2). Any change in the royalty rates made by the Commission pursuant to this provision may be reconsidered in 1980, 1985, and each fifth calendar year thereafter in accordance with the provisions in Section 801(b)(2) (B) or (C).

The purpose of this provision is to reflect the Committee's concern about any change in the rules and regulations of the FCC pertaining to cable carriage of distant signals or to syndicated or sports program exclusivity. The Committee believes that if these rules and regulations are revised, amended, or changed in any manner by the FCC, any owner or user of a copyrighted work should have an immediate right, exercisable for a 12 month period following the date such changes are finally effective, to request an adjustment of the royalty rates specified in Section 111. Further, it is the Committee's intent that any change made by the Commission pursuant to such a petition may be reviewed again in 1980, 1985, and each subsequent fifth calendar year, as the case may be, and under the standards established in Sections 801(b)(2) (B) and (C). It is also the Committee's intent that the ability to petition the Commission to adjust the rates pursuant to this subsection is not limited, following the first adjustment, to the subsequent five year periods specified, but may arise at any time as FCC rule changes described above take place.

**Institution of Proceedings to Adjust Public Broadcasting Royalty Rates.** Section 804(c) provides that the institution of proceedings under Section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in Section 118 shall proceed when and as provided in that section.

**Institution of Proceedings To Distribute Royalty Fees.** Section 804(d) provides that with respect to proceedings under Section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under Section 111 or 116 the Chairman of the Commission shall, upon determination by the Commission that a controversy exists concerning such distribution, publish a notice of commencement of proceedings to distribute the royalty fees in the Federal Register.

**Prompt Resolution of Proceedings.** Section 804(e) provides that all proceedings instituted by the Commission shall be initiated without delay following publication of the notices specified in this section and that the Commission is required to render a final decision in any such proceeding within one year from the date of publication of the notice.

**Judicial Review.** The Senate bill provides that, following a final determination in any proceeding with respect to royalty rates, the Copyright Royalty Tribunal is to transmit its decision to the Senate and House of Representatives for review. Within 90 days of such transmittal either House of Congress may nullify the determination of the Tribunal by adoption of a resolution expressing disappoval of such determination. Judicial review of determinations of the Royalty Tribunal under the Senate bill is permitted only where: (1) The determination was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in any of the members of the Tribunal; or (3) any member of the Tribunal was guilty of any misconduct by which the rights of any party were prejudiced.

The Committee concluded that determinations of the Copyright Royalty Commission were not appropriate subjects for regular review by Congress and that the provisions of the Senate bill providing for judicial review were far too restrictive. Therefore, it amended the Senate bill to eliminate automatic Congressional review and to broaden the scope of judicial review. The amended bill provides for the full scope of judicial review provided by Chapter 7 of the Administrative Procedure Act [5 U.S.C. 701 et seq.]. Congressional review of the activities of the Copyright Royalty Commission will occur as part of the oversight functions of the Judiciary Committees of the House of Representatives and the Senate. The oversight process will provide the Congress sufficient information to determine whether statutory changes are needed at some time in the future.

The expanded judicial review provided in the Committee amendment will permit much more detailed, thoughtful, and careful review of possibly arbitrary or capricious determinations of the Commission than can be provided by Congressional review.

### Effective Date

Chapter effective Oct. 19, 1976, see section 102 of Pub. L. 94-533, set out as an Effective Date note preceding section 101 of this Appendix.

### Chapter Referred to in Other Sections

This chapter is referred to in sections 111, 116 of this title.

## § 801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch.

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be—

(1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and

to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d)(2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable system subscribers for the basic service of providing secondary transmissions are changed so that the average rates exceed national monetary inflation, no change in the rates established by section 111(d)(2)(B) shall be permitted: *And provided further*, That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Commission may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976, pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111(d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; and

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116, and to determine, in cases where controversy exists, the distribution of such fees.

(c) As soon as possible after the date of enactment of this Act, and no later than six months following such date, the President shall publish a notice announcing the initial appointments provided in section 802, and shall designate an order of seniority among the initially-appointed commissioners for purposes of section 802(b).

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2594.)

REFERENCES IN TEXT

The date of enactment of this Act, referred to in subsecs. (b)(2)(A) and (c), is Oct. 19, 1976.

FEDERAL RULES OF CIVIL PROCEDURE

Proof of official record, see rule 44, Title 28, Appendix, Judiciary and Judicial Procedure.

FEDERAL RULES OF EVIDENCE

Hearsay exception, public records and reports, see rule 803, Title 28, Appendix, Judiciary and Judicial Procedure.

Self-authentication, domestic public documents under seal, see rule 902.

CROSS REFERENCES

Authenticated copies of records and papers of department or agency admissible, see section 1733 of Title 28, Judiciary and Judicial Procedure.

Patents for designs, see section 171 et seq. of Title 35, Patents.

Trade-marks registrable on principal register, see section 1052 of Title 15, Commerce and Trade.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 802, 804, 810 of this title.

**§ 802. Membership of the Tribunal**

(a) The Tribunal shall be composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each; of the first five members appointed, three shall be designated to serve for seven years from the date of the notice specified in section 801(c), and two shall be designated to serve for five years from such date, respectively. Commissioners shall be compensated at the highest rate now or hereafter prescribe [1] for grade 18 of the General Schedule pay rates (5 U.S.C. 5332).

(b) Upon convening the commissioners shall elect a chairman from among the commissioners appointed for a full seven-year term. Such chairman shall serve for a term of one year. Thereafter, the most senior commissioner who has not previously served as chairman shall serve as chairman for a period of one year, except that, if all commissioners have served a full term as chairman, the most senior commissioner who has served the least number of terms as chairman shall be designated as chairman.

(c) Any vacancy in the Tribunal shall not affect its powers and shall be filled, for the unexpired term of the appointment, in the same manner as the original appointment was made.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2596.)

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 118, 801 of this title.

**§ 803. Procedures of the Tribunal**

(a) The Tribunal shall adopt regulations, not inconsistent with law, governing its procedure and methods of operation. Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, chapter 5, subchapter II and chapter 7).

(b) Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination.

(Added Pub. L. 94-553, title I, § 101, Oct. 19, 1976, 90 Stat. 2596.)

[1] So in original. Probably should be "prescribed".

REFERENCES IN TEXT

The Administrative Procedure Act of June 11, 1946, referred to in subsec. (a), was repealed and the provisions thereof were reenacted as subchapter II of chapter 5, and chapter 7, of Title 5, Government Organization and Employees, by Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 808, 809 of this title.

**§ 804. Institution and conclusion of proceedings**

(a) With respect to proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in sections 115 and 116, and with respect to proceedings under section 801(b)(2)(A) and (D)—

(1) on January 1, 1980, the Chairman of the Tribunal shall cause to be published in the Federal Register notice of commencement of proceedings under this chapter; and

(2) during the calendar years specified in the following schedule, any owner or user of a copyrighted work whose royalty rates are specified by this title, or by a rate established by the Tribunal, may file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. The Tribunal shall make a determination as to whether the applicant has a significant interest in the royalty rate in which an adjustment is requested. If the Tribunal determines that the petitioner has a significant interest, the Chairman shall cause notice of this determination, with the reasons therefor, to be published in the Federal Register, together with notice of commencement of proceedings under this chapter.

(A) In proceedings under section 801(b)(2)(A) and (D), such petition may be filed during 1985 and in each subsequent fifth calendar year.

(B) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates as provided in section 115, such petition may be filed in 1987 and in each subsequent tenth calendar year.

(C) In proceedings under section 801(b)(1) concerning the adjustment of royalty rates under section 116, such petition may be filed in 1990 and in each subsequent tenth calendar year.

(b) With respect to proceedings under subclause (B) or (C) of section 801(b)(2), following an event described in either of those subsections, any owner or user of a copyrighted work whose royalty rates are specified by section 111, or by a rate established by the Tribunal, may, within twelve months, file a petition with the Tribunal declaring that the petitioner requests an adjustment of the rate. In this event the Tribunal shall proceed as in subsection (a)(2), above. Any change in royalty rates made by the Tribunal pursuant to this subsection may be reconsidered in 1980, 1985, and each fifth calendar year thereafter, in accordance with the provisions in section 801(b)(2)(B) or (C), as the case may be.

(c) With respect to proceedings under section 801(b)(1), concerning the determination of rea-

sonable terms and rates of royalty payments as provided in section 118, the Tribunal shall proceed when and as provided by that section.

(d) With respect to proceedings under section 801(b)(3), concerning the distribution of royalty fees in certain circumstances under sections [1] 111 or 116, the Chairman of the Tribunal shall, upon determination by the Tribunal that a controversy exists concerning such distribution, cause to be published in the Federal Register notice of commencement of proceedings under this chapter.

(e) All proceedings under this chapter shall be initiated without delay following publication of the notice specified in this section, and the Tribunal shall render its final decision in any such proceeding within one year from the date of such publication.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2597.)

### § 805. Staff of the Tribunal

(a) The Tribunal is authorized to appoint and fix the compensation of such employees as may be necessary to carry out the provisions of this chapter, and to prescribe their functions and duties.

(b) The Tribunal may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2598.)

#### Computation and Disbursement by Library of Congress of Basic Pay of Tribunal Personnel

Pub. L. 95-391, title II, § 208, Sept. 30, 1978, 92 Stat. 786, provided that: "The Library of Congress is authorized to compute and disburse basic pay of all personnel of the Copyright Royalty Tribunal pursuant to the provisions of section 5504 of title 5 of the United States Code."

Similar provisions were contained in the following appropriations act:

Pub. L. 95-94, title II, § 208, Aug. 5, 1977, 91 Stat. 678.

### § 806. Administrative support of the Tribunal

(a) The Library of Congress shall provide the Tribunal with necessary administrative services, including those related to budgeting, accounting, financial reporting, travel, personnel, and procurement. The Tribunal shall pay the Library for such services, either in advance or by reimbursement from the funds of the Tribunal, at amounts to be agreed upon between the Librarian and the Tribunal.

(b) The Library of Congress is authorized to disburse funds for the Tribunal, under regulations prescribed jointly by the Librarian of Congress and the Tribunal and approved by the Comptroller General. Such regulations shall establish requirements and procedures under which every voucher certified for payment by the Library of Congress under this chapter shall be supported with a certification by a duly authorized officer or employee of the Tribunal, and shall prescribe the responsibilities and accountability of said officers and employees of the Tribunal with respect to such certifications.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2598.)

### § 807. Deduction of costs of proceedings

Before any funds are distributed pursuant to a final decision in a proceeding involving distribution of royalty fees, the Tribunal shall assess the reasonable costs of such proceeding.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2598.)

### § 808. Reports

In addition to its publication of the reports of all final determinations as provided in section 803(b), the Tribunal shall make an annual report to the President and the Congress concerning the Tribunal's work during the preceding fiscal year, including a detailed fiscal statement of account.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2598.)

### § 809. Effective date of final determinations

Any final determination by the Tribunal under this chapter shall become effective thirty days following its publication in the Federal Register as provided in section 803(b), unless prior to that time an appeal has been filed pursuant to section 810, to vacate, modify, or correct such determination, and notice of such appeal has been served on all parties who appeared before the Tribunal in the proceeding in question. Where the proceeding involves the distribution of royalty fees under sections [1] 111 or 116, the Tribunal shall, upon the expiration of such thirty-day period, distribute any royalty fees not subject to an appeal filed pursuant to section 810.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2598.)

### § 810. Judicial review

Any final decision of the Tribunal in a proceeding under section 801(b) may be appealed to the United States Court of Appeals, within thirty days after its publication in the Federal Register by an aggrieved party. The judicial review of the decision shall be had, in accordance with chapter 7 of title 5, on the basis of the record before the Tribunal. No court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section.

(Added Pub. L. 94–553, title I, § 101, Oct. 19, 1976, 90 Stat. 2598.)

#### Cross References

Agreement to accept determination of Copyright Royalty Tribunal as final in regard to claim for compulsory license fees, see section 116 of this title.

#### Section Referred to in Other Sections

This section is referred to in sections 116, 809 of this title.

[1] So in original. Probably should be "section".

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